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ERRATA.

Page 437, line 14, *after the word* " shew " *read* " that."
„ „ „ 15, *after the word* " specification " *read* " are."
„ „ „ 23, *for* " knowledge " *read* " novelty."
„ „ lines 25, 26, *for* " the man who claimed it, *read* " such a claim."
„ „ line 28, *for* " knowledge " *read* " novelty."
„ 634, „ 5, from the bottom, *for* " conscient and confidant" *read* " conjunct and confident."
„ 635, „ 2, *for* " conscient and confidant " *read* " conjunct and confident."
„ 705, „ 4, *for* " Mr. *Davey*, Q.C.," *read* " Mr. *Kekewich*, Q.C." The names of the various counsel are correctly placed on p. 702.

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

[COMMITTEE FOR PRIVILEGES.]

THE BUCKHURST PEERAGE.

H. L. (E.)
1876
July 14, 17, 18, 20.

[illegible]

Peerage—Shifting Clause.

Where the Crown is pleased to refer to the House of Lords the consideration of a patent of peerage, it becomes the duty of the House to inform the Crown what is the construction to be put upon the terms of any clause in the patent.

One clause in a patent may be invalid without affecting the validity of the patent itself.

There can be no Use or Trust in the case of a peerage.

Therefore where, in a patent of peerage, there were successive limitations of the peerage in the ordinary form of descent, and then a clause was introduced which, on the happening of a collateral event, would transfer the enjoyment of the peerage from the existing peer and his heirs to a new holder, such clause was held to be invalid.

A patent granted the dignity of Baroness *Buckhurst* to a lady for her life, then to *R. W.*, her second son and his heirs male, in default, to *M. S.*,

H. L. (E.)
1876
BUCKHURST PEERAGE.

her third son and his heirs male, and so on to the other younger sons of the same lady. The patent then went on with this proviso: "And we will that if the said *R. W.*, or any other person taking under this patent, shall succeed to the Earldom of *D. l. W.*, and there shall, upon, or at any time after, the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, then, and as often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth*, &c., or the heir who would be next entitled to succeed to the dignity of Baron *Buckhurst* if the person so succeeding to the Earldom of *D. l. W.* was dead without issue male:"—

Held, that this proviso was invalid, and that *R. W.*, the first baron under the patent, who, as such baron, had sat and voted in the House of Lords, though he succeeded to the Earldom of *D. l. W.*, continued to hold the barony as before.

Per LORD CHELMSFORD:—*Semble*, that if *R. W.* had become Earl *D. l. W.* during the life of his mother, and before he himself succeeded to the barony, it might have gone to his next brother, but it having once vested in *R. W.* it could not be divested by the effect of the proviso.

GEORGE JOHN FREDERICK, fourth Duke of *Dorset* and tenth Baron *Buckhurst*, of the old creation of that peerage, died unmarried in 1815. He left his two sisters his co-heirs. The elder of these, Lady *Mary*, married Earl *Amherst*; the younger sister married in 1813 *George John West*, fifth Earl *De la Warr*. *Charles*, the fifth Duke of *Dorset*, and eleventh and last Lord *Buckhurst* (of the old creation), died without issue in 1843, and the two peerages of *Dorset* and *Buckhurst* then became extinct. The estates were divided between the two sisters, co-heirs of *George John Frederick*, the fourth Duke. The estate of *Knole*, in the county of *Kent*, was possessed by the elder sister *Mary*, Lady *Amherst*. This lady had no children, and in 1860 she made a will giving her mansion-house and estate at *Knole* to trustees in trust for her sister the Countess *De la Warr* for life, and after her death to *Charles Richard* (the then eldest surviving son of Earl *De la Warr*, Lord *Cantelupe*, the eldest born son, having died some years earlier), and his heirs in tail male, remainder to *Mortimer Sackville West*, the third surviving son, and his heirs in tail male, remainder in like manner to the other sons.

On the 26th of April, 1864, Her Majesty granted to the Countess *De la Warr* the dignity and honour of Baroness *Buckhurst* for life, and after her decease "the same state, degree, style, dignity, and honour of Baron *Buckhurst*, unto our trusty and well-beloved

S C Cope v De la Warr 6 Ch D 666. CA

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Reginald Windsor Sackville West, now second surviving son of the said *Elizabeth*, Countess *De la Warr*, and the heirs male of his body," and in default of such issue to *Mortimer Sackville West*, the third surviving son of the Countess, and the heirs male of the body of such third surviving son, and in default of such issue to the fourth surviving son of the said *Elizabeth* and the heirs male of his body, and in default of such issue to the fifth surviving son of the said *Eizabeth* and the heirs male of his body. To all of these, respectively, a seat and place in Parliament were in the usual manner granted; and then the letters patent contained the following proviso: "And we will, and by these presents, for us, our heirs and successors, do grant, direct, declare, and provide that if the said *Reginald Windsor Sackville West*, or any other person taking under these our letters patent, shall succeed to the Earldom of *De la Warr*, and there shall, upon, or at any time after, the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, then, and so often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth*, &c., or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst* if the person so succeeding to the Earldom of *De la Warr* was dead without issue male."

Lady *Amherst*, on the 2nd of May, 1864, made a codicil by which she declared her intention to settle the estates devised by her will, "in a course of settlement to correspond, as far as may be practicable, with the limitations of the barony of *Buckhurst*;" and she revoked the devises in the will and gave directions according to the intention thus declared. The effect of this codicil was discussed in the suit of *West* v. *Holmesdale* (1), and a settlement was there confirmed which had vested the *Knole* estate in *Reginald Windsor Sackville West*, then second surviving son of the Earl and Countess *De la Warr* and his heirs male; but a shifting clause was added in exact accordance with the proviso in the patent.

George John, the fifth Earl *De la Warr* (the father of the claimant *Reginald Windsor West* (now Earl *De la Warr*), and of the counter-claimant, Mr. *Mortimer Sackville West*), died the 23rd of February, 1869, and was succeeded by his eldest surviving son, *Charles Richard*, who took his seat as sixth Earl *De la Warr* on the 22nd of April, 1869.

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(1) Law Rep. 4 H. L. 543.

The Lady *Elizabeth*, by marriage Countess *De la Warr*, and by creation Baroness *Buckhurst*, died on the 9th of January, 1870, and thereupon her second surviving son, *Reginald Windsor*, became, according to the grant in the letters patent, Lord *Buckhurst*. On the 8th of February, 1870, he took his seat in Parliament as Baron *Buckhurst*, and repeatedly voted in respect of that peerage. His elder brother, *Charles Richard*, the sixth Earl *De la Warr*, died unmarried on the 22nd of April, 1873, and was succeeded in the Earldom by *Reginald Windsor*, who was then sitting in the House of Lords as Baron *Buckhurst*, and, twice after the death of his brother, but before he was himself summoned on his higher title, he voted as Baron *Buckhurst*. *Reginald Windsor* was on the 19th of May, 1873, summoned to the House of Lords as Earl *De la Warr*, and on the 15th of July, 1873, took his seat as Earl, since which time he has ceased to vote as Baron *Buckhurst*, and has voted as Earl *De la Warr*.

On the 28th of March, 1876, the Earl *De la Warr* presented a petition to Her Majesty praying that Her Majesty would be graciously pleased to determine and declare that the proviso or shifting clause in the patent creating the title, dignity, and honour of Baron *Buckhurst* was and is repugnant to the general scope of the letters patent, and was not valid and effectual to pass the title, dignity, and honour to the Petitioner's next brother, the Hon. *Mortimer Sackville West*, on the accession of the Petitioner to the Earldom, and to declare that the said shifting clause was and is wholly inoperative, and to order that such clause be expunged from the letters patent.

On the 3rd of April, 1876, Mr. *Mortimer Sackville West* presented his counter-petition to Her Majesty, and, after setting forth all the facts, the Petitioner prayed that it might be declared and adjudged that he was entitled under the proviso in the patent to the honour and dignity of Lord *Buckhurst*, and that he might be summoned to Parliament in such honour.

The two petitions were referred to the Attorney-General, who made his report thereon, and the case was then referred by Her Majesty to this House.

Mr. *Fleming*, Q.C., and Mr. *Eddis*, Q.C., appeared for Mr. *Mortimer Sackville West.*

Mr. *H. Fox Bristowe*, Q.C., and Mr. *T. Cope*, appeared for the Earl of *De la Warr.*

The *Attorney-General* (Sir *J. Holker*), and Mr. *Charles Clark*, Q.C., appeared for the Crown.

Mr. *Fleming* and Mr. *Eddis* :—In considering what is the construction of a grant the judges of that construction ought to be placed as much as possible in the position of the grantor. Here the grantor was the Crown, and the intention of the Crown in making the grant must have due weight. There could be no doubt about that intention. The peerage of *Buckhurst* was an old peerage and had been held by very distinguished men. The intention of the Crown was to create that peerage again, in favour of a member of the same distinguished family by which it had been formerly held, and to give it as a substantive honour distinct from that other peerage of higher rank which existed in the same family. Such was the plain intention of the Crown, and that intention had been well carried into effect by the words of this patent. Complete effect must be given to every part of the patent. Their Lordships would hardly assume to have a jurisdiction to interfere with a Royal grant. The power of the Crown to create honours and dignities, with any line of descent, was undoubted. The only limitation ever attempted to be put on the exercise of this power of the Crown was, that there must be hereditary descent as one of the qualifications of the grant. That was absolutely required to enable the persons favoured by the Crown to take a seat in this House. A seat here was refused to Lord *Wensleydale* solely because his first patent was deficient in that respect (1). The grant of a title, without the accompanying right to a seat, might be good, and many such grants had been made in former times, when aliens had received grants of peerage, (several instances were referred to,) and minors too had received them, though neither aliens nor minors could sit in Parliament. This shewed the unbounded power of the Crown in making such grants. Aliens could only take a seat by virtue of an Act of Parliament passed in their favour. Minors became entitled to a seat on coming of age, though they were peers by creation before that time, and there was one remarkable instance that the creation of a minor to be a peer was a valid and binding creation, and that was the case of Lord *Charles Douglas*, a younger son of the Duke of *Queensberry*, who had in childhood been created Earl of *Solway*, in *Scotland*. His title as a peer of *Scotland*, created before the Union with *England*, stood in his way to a seat in this House as a peer of *England*, and it was held by the House of Lords, in 1719, not only that he was well created a peer of *Scotland* in 1706, but that he "could not waive or refuse the dignity conferred upon him in his infancy" (1), and consequently he was refused a seat as an English peer.

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(1) *Wensleydale Peerage Case*, 5 H. L. C. 958.

It is clear, therefore, that the Crown possesses the power to create peerages, and to create them with any descendible quality. That power has been rightfully exercised in the present case. A peerage had here been given for life to a lady, the succession being granted to her second son and his heirs male; but as that succession might involve the union, in one person, of two actual peerages which it was the object of the Crown to keep distinct from each other, it was provided that on the holder of one of them, the *Buckhurst* peerage, becoming entitled to the higher peerage of Earl *De la Warr*, the next brother should take the former dignity. As soon as that event of succession to the peerage of *De la*] *Warr* took place, the first holder of the peerage of *Buckhurst* ceased to be the possessor of that title. From that moment he became incapable of sitting as Lord *Buckhurst* in this House, and if, after obtaining and presenting his writ as Lord *De la Warr* he had proposed to vote as Lord *Buckhurst*, and a question had been raised as to his vote under that title, it must have been rejected. Such was the intention of the Crown, and the House must have given effect to it.

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(1) *Mortimer Sackville's* case, p. 9, n. 2, quoting Lords' Journals (1719), p. 196. See also *Duke of Queensberry and Dover's Case*, 1 P. Wms. 582, 592, n. 1. It seems that there arose at one time an opinion that a person who had been a peer of *Scotland* before the Union could not be created a peer of *England* after it. The Duke of *Queensberry*, an active promoter of the Union, who was a peer of *Scotland*, had been, after the Union, created Duke of *Dover*, and sat in two Parliaments in the House of Lords. There is no record of his right to sit under the English title having been questioned. But on his son succeeding to the Dukedom the question was raised, and in 1719 decided against him. In 1782 the question was again raised, but then decided the other way. See 1 P. Wms. 582, 592, n. 1; Beatson, Political Index, pp. 90, 91, n., and Robertson, Proceedings relating to the Peerage of *Scotland*, pp. 77, 81.

The new holder of the peerage would not have come in by way of remainder; it was not a remainder, it was a new creation. [THE LORD CHANCELLOR:—The proviso uses the word "succession."] There cannot, by law, be a remainder in a peerage. The first estate ceases on the happening of a particular event, and on that happening, the new estate takes effect. That is a real "succession." Here the two titles are distinct; the word "succeed" in the first part of the proviso applies to the *De la Warr* peerage, and as to the *Buckhurst* peerage, the "succession" is to "devolve" upon Mr. *Mortimer Sackville West.* The two peerages were meant to be kept entirely distinct from each other. This was as much a new creation as when, on failure of issue in a grantee, the peerage was directed to go to a distant relation, or even to a stranger in blood. And such a peerage might be created, and would be lawful. [Several instances, among the rest that of the *Brougham* peerage, were referred to.] In the Viscounty of *Bolingbroke* the creation so made was one of a very peculiar kind. The original creation was to the celebrated *St. John*, on failure of issue of the body of him, the first grantee, the title was to go to his father and the father's heirs, and that was held to be a new creation, a distinct grant, so much so that it was claimed and held by a grandson of the person to whom it was limited on the failure of issue male of the first grantee, and the fact of the attainder of that first grantee was held not to affect it.

A peerage is an estate within the protection of the Statute *De Donis.* That was admitted in the *Neville Case* (1), and was asserted very clearly in the *Ferrers Case* (2), where there was an elaborate argument of Chief Baron *Parker*, adopted by Lord Keeper *Henley*, in which it was distinctly said that "all entailed honors are within the protection of the Statute *De Donis*," and this opinion was afterwards repeated and acted on in the case of the Duke of *Athol* (1).

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(1) 7 Co. Rep. 33 a.

(2) 2 Eden, Ap. 373.

That being so, it is clear that the words of this patent create a valid estate tail within the provisions of that statute. An estate tail may fail on the happening of other events besides the failure of issue: *Preston* on Estates (2). The observations there made were most important to be considered here. What is the will of the donor? for the Statute *De Donis* expressly declares that the will of the donor shall have effect. Apply those rules to this case, and the result in favour of the claim of Mr. *Mortimer Sackville* is inevitable. The proviso is the expression of the will of the Crown. It is in accordance with the rules and with the forms of law; it violates no law of Parliament. It is not open to the objection that its application will have the effect of removing from the House a peer who has previously sat and voted in it, for it only transfers to another person the title which the former had previously enjoyed, and which, upon his becoming entitled to assume a higher rank than before, became vested in his younger brother. This proviso was in truth a new limitation, and it was valid as such.

A gift to a man and his heirs, Lords of the Manor of *Dale*, would be a limitation to him and them so long as they are Lords of the Manor of *Dale*. The *De L'Isle* peerage was a case of that sort. [LORD REDESDALE:—But is not this clause a real destruction of the first estate tail?] No; it is a mere limitation, but the entail is preserved. [THE LORD CHANCELLOR:—Where is the authority for saying that it is a mere limitation?] In *Preston* on Estates (3) it is said: "A limitation to a man and his heirs, tenants of the manor of *Dale*, or to a woman during widowhood, or to *C.* till the return of himself or *B.* from *Rome*, or to *D.* for twenty-one years if *A.* should live so long, marks some event for the determination of the estate, which is collateral to the time of its continuance, so far as that time depends on the clause of direct limitation, and the construction of law on the extent of the words of limitation." There are other similar passages in the same work (4), and *Arton*

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(1) Cruise on Dignities, c. iv. ss. 83, 84, *et seq.*, Ed. 1823; Robertson's Proceedings, &c., relating to the Peerage of *Scotland*, pp. 316, 318.

(2) Vol. i. pp. 42, 54.

(3) Vol. i. p. 42.

(4) At pp. 26–55.

v. *Hare* (1) is referred to, where there was a gift to *A.* and the heirs male of his body until an act done, and after that done to another in fee, is referred to as an instance. Words sounding in condition may be taken as words of limitation.: *Page* v. *Heyward* (2), a case expressly adopted by Lord *St. Leonards* in *Egerton* v. *Brownlow* (3), and his Lordship treated it as a settled rule of construction that where it was possible to construe the words of a gift as a limitation they were not to be treated as amounting to a condition. If this is a limitation, the estate is good at Common Law, and it is submitted with confidence that it is a special limitation; it is as a dignity given to *A.* and his family not succeeding to a certain other dignity; surely such a gift, so expressed, must be good. It is a grant, by the Sovereign, of a dignity to the younger son of a family, to take effect if the elder succeeds to another dignity. That is no defeasance of a prior estate, but a limitation of a new estate on the happening of a certain event. It cannot be said to be impossible for the Crown to grant a dignity to the younger son of a noble family in such a way that the new dignity shall never be enjoyed with the old. That would indeed be to restrict the power of the Crown. A gift of this sort must be so construed as to carry into effect every part of the grant.

That a peerage may be determinable and be determined by some other event than the death without issue of the holder, is shewn by the *De L'Isle Case* (4). In that case, which was that of the grant of the peerage of *De L'Isle* by reason of the possession of the manor and lordship of *Kingston L'Isle*, when that manor of *Kingston L'Isle* was sold to a stranger, the previous holder of the peerage became a commoner, and so would have remained, but that a new creation of viscount placed him again in this House. And a surrender of a peerage might be made to the Crown. There were many cases in former times where, not only in *Scotland* but in this country itself, peerages were surrendered to the Crown (5).

(1) Poph. 97.

(2) 2 Salk. 570.

(3) 4 H. L. C. at p. 223.

(4) Report by Sir H. Nicolas, 1829.

(5) Several instances were mentioned (Mr. *West's* printed case, p. 23), among them was that of *Charles Brandon*, who being intended to marry *Elizabeth Grey*, daughter and sole heir of Lord *De L'Isle*, was created by *Henry* VIII. Lord *De L'Isle*, to him and the heirs male of his body by the said *Elizabeth Grey*; but the marriage never took place, and so the patent for the creation was delivered up and cancelled.

It was not, therefore, contrary to the settled law of peerage that on the happening of a given event an existing peerage should pass from the holder of it, though he was still alive, to another person. A peerage, which was of the highest rank in this realm, was an instance of this sort, the peerage there passing away while the holder of it was alive, and going to his eldest son. That was the case of the Duke of *Cornwall* (1), where the instant the holder of the Dukedom became King his eldest son became Duke of *Cornwall*. The principle thus recognised in the highest peerage in the realm could not be said to be contrary or even unknown to the law, and might well be applied, at the pleasure of the Crown, to another peerage. There was, however, another case, which more perhaps than any other shewed the power of the Crown to mould inheritances at its pleasure. That was the case of *Lucas* of *Crudwell*, where the grant was to a lady, the sole heir of *John*, Lord *Lucas*, who was married to *Anthony Grey*, the eleventh Earl of *Kent*. She was by *Charles* II. created Baroness *Lucas*, of *Crudwell*, to hold to her and the heirs male of her body, whom failing, to the heirs of her body by her then husband, and then there was a provision that if at any time, by default of issue male of the marriage, there should be "more than one person who should be co-heirs of the said *Mary* and the said Earl, so that we, our heirs or successors, should have the power either to declare which of them should have and enjoy the name, title, &c., by these presents given and granted, or otherwise, at our pleasure, to suspend or extinguish the same, then nevertheless, in such case, the same name, title, &c., shall in no wise be suspended or extinguished, but shall go to, and, from time to time, shall be held and enjoyed by, such co-heir aforesaid as would by the course of descent by the Common Law of our realm of *England* be inheritable to any other entire and indivisible inheritance," &c. [Mr. *Fox Bristowe* observed that nothing could be said as to any peculiarity in this grant, because it had been confirmed by Act of Parliament, 15 Car. 2.] Still, it shewed that the Crown was not fettered in its grants of peerages by the necessity of following any particular rule of descent. In addition to these various cases which established the unlimited power of the Crown in such matters, there was the very recent case of the *Cromartie* peerage granted to the Duchess of *Sutherland*. The patent there, which passed the Great Seal in October, 1861, granted to the Duchess of *Sutherland* the dignity of Countess of *Cromartie* for life, then to her second surviving son and the heirs male of his body, and in default to each of the other younger sons and the heirs male of their bodies, then to Lady *Florence* and the heirs of her body, and in default to each of the other daughters and the heirs of their respective bodies, and then there was a proviso exactly resembling the proviso in the present case, to the effect that if any holder of the title should succeed to the Earldom of *Sutherland*, then and immediately the son or daughter next entitled to the dignities thereby created should succeed to the Earldom of *Cromartie* as if the person succeeding to the Earldom of *Sutherland* was dead without issue. The proviso in the *Buckhurst* peerage was not therefore without example; it had a precedent in a creation of an earlier date. Both creations declared the express will of the Crown, and both were within the legitimate use of its authority and discretion.

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(1) *The Prince's Case*, Co. Rep. pt. viii.

The proviso has been improperly described as a shifting clause. It does not bear that character, though, if it did, it would be warranted by a long-established practice in Parliamentary proceedings which it closely resembles. From a very early period to the present day, there had existed the practice of calling up the son of a peer in his father's barony, his father still sitting in the House, though by a higher title. That was the counterpart of the present case. The son held, by a new creation, so much so that if the son died during the lifetime of the father, the son of that son would be entitled to a writ of summons. That was in no way in derogation of the right of the peerage. The Crown had clearly a right to say that when a peer came to sit by a higher title than he had formerly enjoyed, he should not sit by that former title, and the calling up of the son vested in him the barony which his father had held, so that instead of sitting as the last created of the barons he sat in the precedency of the barony in the name of which he had been called up.

Then again the Earl *De la Warr* was in this case estopped from questioning the validity of the letters patent; he has adopted them, he has acted on them; he has taken his seat under them;

and he cannot now question them. In the language of the Scotch law he cannot at once approbate and reprobate. He cannot take under a grant from the Crown and then question the validity of the grant: *Rolle's* Abridgment (1); *Brooke's* Abridgment (2). Yet the Earl petitions that this proviso may be expunged from the patent. There can be no authority but that of Parliament itself which could expunge this clause from the patent. Full effect must, therefore, be given to it.

Mr. *Fox Bristowe*, Q.C., for the Earl *De la Warr*:—

The attempt here made is one of a perfectly novel kind. The rule of law is that when a peerage has once vested in an individual it is not to be de-vested, to be taken from him, but on the commission of a crime and by due process of law. It was possible that if the Earl *Charles Richard* had died during the life of his mother, and *Reginald* had then become Earl *De la Warr*, the peerage of *Buckhurst* might have gone over to *Mortimer West*, who would then have been the second son, but when it had once vested in *Reginald* it could not be taken from him but by the settled rules of law. The word "succeed" in a patent of peerage implied a succession in the ordinary form of law, and that title by succession could not be defeated in a way unknown to the law, and on the mere happening of a collateral event. It is sought here to put an end to the peerage of a noble lord when no crime whatever has been charged against him, and when he has not in any way subjected himself to any process of law, nor by any act of his own rendered his issue liable to a forfeiture. It is put forth on the other side, as a settled rule of peerage law, that in cases of peerage the hereditary principle is essential to be observed. Here that principle is sought to be violated. There is no doubt that on the death of a grantee without issue the peerage might go over—might become vested in a distant relative or in a perfect stranger. There would be no violation of the hereditary principle in such a case. That might be called a new creation, for the determination of the first peerage would be by a natural event. But here it was sought to be devested by an event wholly collateral. And it seemed to be supposed that the Crown had the intention, and had the power, to create by one patent two co-existent peerages, the first to come to an end on the happening of a collateral event, and the other to arise on that event. That argument could not be sustained. It might admit of doubt whether such an inconsistent and self-contradictory grant could be good with regard to land, but it certainly was not good with regard to a peerage. Such a grant and such a proviso could not be made good by the Statute *De Donis.* That statute related to grants of land, but had nothing to do with peerages. The report on the dignity of a peer was conclusive on this point (1). Then, again, it had been contended that the power of the Crown in the creation of peerages was unlimited. But that was not so. The case of the claim to the Earldom of *Wiltes* (2) had expressly negatived that supposition. In many other cases had the lawfulness of grants been questioned in this House; and here, the Crown had itself referred this particular patent to the consideration of the House. And it was remarkable that in all the cases cited to shew that the Crown possessed the power to assign any kind of descent to a peerage, and to make it pass from one person to another, the change in the line of devolution was never to take place except on the failure of the issue of the holder. That was certainly the case in the *Lucas* of *Crudwell* peerage which had been so much relied on, though, if it had been otherwise the case would have had no weight as a precedent, since that peerage had been the subject of the provisions of Act of Parliament (3). The case of the first creation of the peerage of *De L'Isle* was hardly an authority here, for whatever doubt or difficulty might have been felt in that one instance by the introduction of the words "Lords of the Manor of *Kingston L'Isle,*" and the subsequent sale of that property, had been got over by a subsequent patent creating the person a viscount; and in the other case relating to the same peerage of *L'Isle,* cited to shew that a patent could be surrendered, it was clear that the patent to *Brandon* never could have taken effect, since the marriage in respect of which it was declared to be granted, was never solemnized. That fact was specially referred to in the subsequent grant to Sir *Arthur Plantagenet* (1). It was therefore merely an instrument in itself utterly void that was delivered up and cancelled. But it was perfectly clear that no existing peerage, every peerage being a personal dignity inherent in the blood of the grantee, could be surrendered: Report on the Dignity of a Peer (2); The *Purbeck Case* (3). On the question of surrender, which, however, could only be made applicable here as affecting the supposed unlimited power of the Crown, the *L'Isle Case* was, therefore, of no value. As to another case referred to for the purpose of shewing that a peerage might go over though the holder was still alive, the case of the Duke of *Cornwall*, that was not an instance which could at all be applied to the present case. It was not an instance of a dignity taken from an existing peer during his life, and while he was still legally competent to hold it, and transferred to another person. The King could not be a peer—he had no peer, he was above all peers; the moment the Duke of *Cornwall* became king he ceased to be Duke of *Cornwall* and a peer; and the dignity passed to the person in whose favour it had been originally and by actual designation, created, namely, the eldest son of the King. So that, independently of the circumstance that what related to succession among the members of the royal family, might possibly be different from the ordinary rules of succession, there was the constitutional impossibility of the King holding a peerage, and the peerage, which he could not hold, devolved of necessity on the next person designated as its holder.

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(1) Page 864.

(2) Tit. "Estoppel."

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(1) 3 Rep. Dig. Peer. 44, *et seq.,* 258 *et seq.*

(2) Law Rep. 4 H. L. 126.

(3) The Act (a private Act, 15 Car. 2) confirmed the patent in its terms.

The case of *Lucas of Crudwell*, though it appeared at first sight a curious grant, was really a very simple one, and the case itself had not the least application to the present. The patent granted a dignity, and went on in the usual way, till it assumed the possibility of there being no male heir, so that the dignity would fall into abeyance, and then, declaring that it was in the power of the sovereign to select one among the co-heirs, or to suspend the grant of the dignity, or to extinguish it, went on to say that in every such case the dignity should not be in abeyance or be extinguished, but that the eldest co-heir should succeed. That was nothing but

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(1) Sir Harris Nicolas' Rep. App. iv. p. 409.

(2) 3 Rep. p. 15, *et seq.*

(3) Show, P. C. 1.

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an abandonment of the power of the Crown in one particular respect. The power was asserted in the patent—and then the King declared that in that particular case he would not exercise it. In no respect whatever could that case be made to resemble the present. So far as there was any peculiarity about it, it was merely in the fact that the Crown declared an intention not to act upon the common rule applicable to cases of abeyance, but to apply to the case the ordinary principle of succession by seniority of age.

The Scotch cases did not furnish any rule by which the present case was to be decided, and the *Cromartie Case* itself, the only one that resembled the present, could not be relied on as a precedent, for it was almost a contemporaneous grant, and had not been, as yet, made the subject of discussion.

The proviso in this case was so entirely at variance with the hereditary principle, that, if it could have any effect, it would, while any holder of the peerage had issue, take it away from him and his issue, and transfer it to another person who, and whose issue might, also, on the happening of the same contingency, which was wholly collateral, be again deprived of it.

Mr. *Fleming* replied.

The Attorney-General:—

There were but two questions in the case: first, what was the construction to be put upon the proviso? Secondly, was the construction sought to be put upon it by the learned counsel for Mr. *Mortimer Sackville West* the right one? As to the first question the idea that the shifting was only to occur on the death of one Earl and the succession of a brother to the Earldom during the lifetime of the Countess of *Amherst*, certainly was not borne out by the words of the proviso itself. There was in that no such limitation as to the time of its operation; it was to operate whenever it should happen that the possessor of the title of *Buckhurst* should succeeed to the title of *De la Warr*. Then was the construction now sought to be put on the shifting clause the right one? Such a clause did not accord with the great principle of peerage law; if it created a peerage it only did so by

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destroying one, and that, too, not upon the failure of issue nor upon any fault or crime in the possessor, but entirely upon the happening of a collateral event. It did not seem, therefore, that such a clause in a patent could be supported. In all the cases which had been relied on in support of it, the determination of the existing peerage depended, not as in this proviso, upon the happening of a collateral event, but upon the failure of issue, which was according to the recognised rule of peerage law. This fact rendered inapplicable all the cases in which there appeared to be a transfer of the peerage. The only apparent exception was that of the case of the Duke of *Cornwall;* but in reality that was no exception at all, for the Dukedom could not be held by the King, and the peerage therefore immediately devolved upon his eldest son, that being in reality a descent in the usual form, and not an arbitrary devolution contrary both to form and principle. In the *Lucas Case* there was really no shifting at all, the peerage followed the usual course of descent, but in the case of an abeyance happening, the Crown consented to forego the exercise of one of the powers which it might exercise in such a case, and introduced among the females the operation of the ordinary rule of descent among males. That was all. But even if that case had in any way been applicable to the present, it could have no weight as a legal precedent, for the grant, whatever might be its construction, had been confirmed by an Act of Parliament. But it was not applicable at all.

The proviso here could not properly be described as a limitation. Its construction was that which he had already indicated. Whether that might, in any way, affect the general validity of the patent was not now a question to be considered. The proviso itself could not be supported.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the importance of the question raised in this case is so great, that were it not for the length of time that it has been under your Lordships' consideration, and for the great assistance which you have received from the very learned arguments at the Bar, your Lordships would probably have desired some farther time to consider the case; but, having regard to those advantages, and to the circumstance that I do not think that any doubt exists in your Lordships' minds as to the conclusion at which you ought to arrive, I think that no object would be gained by any farther delay.

I must remind your Lordships how it is that the case comes before this Committee for its consideration; for a proper estimate of the circumstances under which it does so, will dispose of a certain part of the argument which you have heard.

The Honourable *Mortimer Sackville West* presented a petition to Her Majesty, referring to certain letters patent granted, in the year 1864, to the late Countess *De la Warr*, and praying Her Majesty "to be graciously pleased to admit his succession to, and to declare and adjudge that he is entitled to, the honour and dignity of Lord *Buckhurst*, of *Buckhurst*, in the county of *Sussex*," under those letters patent, and that Her Majesty would be pleased to cause him to be summoned to Parliament as Lord *Buckhurst*. That petition having been presented to Her Majesty, it was referred in the usual way to the Attorney-General "to consider thereof, and to report his opinion what may be properly done thereon." The Attorney-General made a report to Her Majesty, in which he stated the evidence of pedigree which had been brought before him, and the general nature of the letters patent which I have mentioned, and then he proceeded thus: "Having thus stated to your Majesty the evidence laid before me by the Petitioner, the Honourable *Mortimer Sackville West*, in support of his petition, I beg leave humbly to certify to your Majesty that it appears to me that he is the person pointed out by the before-mentioned letters patent of your Majesty to succeed to the dignity of Lord *Buckhurst* on the succession of the present Earl *De la Warr* to the honour of Earl *De la Warr*; but as doubts have been expressed as to the effect in law of the clause in the letters patent under which the Petitioner claims, I humbly recommend your Majesty, should such be your Majesty's gracious pleasure, to refer the farther consideration of the Petitioner's claim to the House of Lords." Upon that report of the Attorney-General being made, Her Majesty, by the Secretary of State, was pleased to make this order: "Her Majesty being moved on this petition, is pleased to refer the same, together with the Report of Her

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Majesty's Attorney-General thereon, to the Right Honourable the House of Peers, to examine the allegations thereof as to what relates to the Petitioner's title therein mentioned, and to inform Her Majesty how the same shall appear to their Lordships."

My Lords, some question was raised as to the practice and the authority of your Lordships' House in coming to any conclusion which might appear to be adverse to a royal grant. The position of matters is this: the Crown itself being informed, by its law officer, that doubts have been entertained as to the validity of a particular clause in the letters patent, is pleased to refer that question, inasmuch as it touches a dignity of the peerage, to the consideration of your Lordships' House, to inform Her Majesty what is your Lordships' opinion on the subject. That puts aside at once all question as to the course which it is in the power of your Lordships to take, and in fact makes it clear that it is your Lordships' duty to inform Her Majesty of what your opinion is as to the question which has been raised upon these letters patent.

Now, my Lords, the circumstances connected with the letters patent may be very shortly stated. In the year 1864, the state of the family of the late Countess *De la Warr* was this: *George John*, fifth Earl *De la Warr*, her husband, was still living. Their eldest son had died many years previously. They had at the time five sons, namely, *Charles Richard* (who subsequently succeeded to his father as Earl *De la Warr*), *Reginald Windsor*, her second surviving son, the Honourable *Mortimer Sackville West*, the Petitioner, her third surviving son, and two still younger sons.

My Lords, in that state of things the Queen was graciously pleased to grant a barony to the Countess *De la Warr*, and desired that that barony should go to her then second son, and, no doubt, that it should be kept distinct, as far as lawfully the Crown could make provision for its being kept distinct, from the Earldom of *De la Warr*. The course that was adopted was this: letters patent passed under the Great Seal, which were dated the 27th of April, 1864, and in the usual way they created *Elizabeth*, Countess *De la Warr*, Baroness *Buckhurst*, of *Buckhurst*, in the county of *Sussex*, "for and during the term of her natural life, and after the decease of the said *Elizabeth*, Countess *De la Warr*," the patent ran, "To have and to hold the name, state, degree, style, dignity, title, and honour of Baron *Buckhurst*, of *Buckhurst*, in our county of *Sussex*, unto our trusty and well beloved *Reginald Windsor Sackville West*, now second surviving son of the said *Elizabeth*, Countess *De la Warr*, and the heirs male of his body lawfully begotten and to be begotten; and in default of such issue, to the third surviving son of the said *Elizabeth*, Countess *De la Warr*, by her said husband, *George John*, Earl *De la Warr*, and the heirs male of the body of such third surviving son lawfully begotten and to be begotten; and in default of such issue, to the fourth surviving son of the said *Elizabeth*, Countess *De la Warr*, by her said husband, *George John*, Earl *De la Warr*, and the heirs male of the body of such fourth surviving son lawfully begotten and to be begotten; and in default of such issue, to the fifth surviving son of the said *Elizabeth*, Countess *De la Warr*, by her said husband, *George John*, Earl *De la Warr*, and the heirs male of the body of such fifth surviving son lawfully begotten and to be begotten."

Then came certain other clauses, in the ordinary form, declaring the right to a seat in Parliament, and so on; and towards the close of the letters patent there occurred this proviso, "We will, and by these presents, for us, our heirs and successors, do grant, direct, declare, and provide, that if the said *Reginald Windsor Sackville West*, or any other person taking under these our letters patent, shall succeed to the Earldom of *De la Warr*, and there shall, upon or at any time after the occurrence of such event, be any other younger son, or any heir male of the body of such other son, then, and so often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth*, Countess *De la Warr*, or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst* if the person so succeeding to the Earldom of *De la Warr* was dead without issue male."

That, my Lords, is the proviso as to which the Attorney-General stated in his report that doubts were entertained as to its validity, and that is the proviso which led to the present reference to your Lordships. The proviso is certainly, at first sight, a somewhat startling one when applied to the case of a peerage. It is a very strong observation that, with the exception of one other patent, coeval almost with the one of which I am speaking, no instance has been found in which a clause of this kind, appearing to shift over a dignity from one person to another, has ever been introduced. Moreover, the observation is obvious, that if this is a valid clause which can be attached to a grant of a peerage, a peerage becomes a title which can be made to shift upon the occurrence of a collateral event wholly unconnected with the failure of issue. It can be made to be taken away from the holder of it for the time being, and passed over to some other person who was not the holder of it before. It is very true that the occurrence upon which, in the present instance, this shifting is made to depend, is the succession of the holder of the barony to a higher title, so that the event leaves the person who has been the holder of the barony in possession of the dignity of the peerage, and of a rank still higher than before. He will, therefore, still continue to possess a seat in your Lordships' House. But it is simply an accident that the collateral event here specified can be thus described and has that particular consequence. If the proviso is valid with regard to an event of that kind, it must be equally valid with regard to any other collateral event, however different such collateral event may be. My Lords, of course in all matters, especially matters touching the limitation of peerages and of dignities, the introduction of a clause at the present day altogether unusual and altogether unknown in the previous history of the country, is, of itself, a matter of great gravity and of extreme importance, and requires to be most carefully and narrowly examined by your Lordships.

My Lords, I also will remind your Lordships, without referring at any length to authorities upon the subject, that, with regard to peerages, it is the well-established and constitutional law of the country that a peerage, partaking of the qualities of real estate, must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law, and that in the descent of peerages there cannot be introduced variations or alterations in the ordinary law of the country with regard to descent; and by a parity of reasoning, there cannot be introduced provisoes and conditions controlling and moulding the descent of a peerage in a manner different from that in which real estate can be made to descend according to the law of the country. I will refer your Lordships to one very recent instance in which the whole of this question was considered. I mean the *Wiltes Peerage Case* (1), in which it was clearly laid down by the Committee for Privileges of your Lordships' House, and the report of the Committee was confirmed by the House, that the Crown cannot give to a grant of a dignity or honour a quality of descent unknown to the law. Upon that point there was no difference of opinion among the noble Lords who expressed their opinion upon the subject.

Now, my Lords, these being the general observations which occur with regard to a question of this kind, I should suggest that the first step to be taken in arriving at a conclusion as to the present letters patent is to determine what, upon the ordinary principles of construction, is the construction and the meaning of the proviso to which your Lordships' attention has been called. My Lords, various constructions have in the course of the argument been put forward at your Lordships' Bar. I will first notice some of them which I certainly am not able to adopt.

It was observed on the part of the present Lord *De la Warr* by his counsel, who argued his case with very great ability, that the proper construction of this proviso, which I have read at length, beginning with the words, "If the said *Reginald Windsor Sackville West*," &c., was that it was introduced as a proviso not to apply upon all occasions, to all time, when a holder of the *Buckhurst* peerage might succeed to the *De la Warr* peerage; but that it might be meant to apply merely during the life of the late Lady *De la Warr* who was made Baroness *Buckhurst* for her life, and that it was merely intended to indicate that if, during her life, there had been a succession by *Reginald West* or any other brother, or his issue, to the Earldom of *De la Warr*, the person so succeeding to the Earldom of *De la Warr* should not succeed upon the death of the late Lady *De la Warr* to the Barony of *Buckhurst*, but that that barony should go over to the next person in remainder. My Lords, if that were so, of course it would defeat the claim of the Petitioner, Mr. *Mortimer Sackville West*, because no change in the succession did actually occur during the lifetime of the late Lady *De la Warr*. And at her death the person to succeed under this

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(1) Law Rep. 4 H. L. 126.

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patent would be the present Lord *De la Warr, Reginald Windsor Sackville West.*

But I am not able to adopt this construction of the instrument. It appears to me perfectly clear that the proviso, whether it be valid or invalid, was in point of construction intended to be a proviso applying, not merely during the lifetime of the late Lady *De la Warr,* but at all times so long as any of her sons or their issue male continued, because the words are, "then and so often as the same shall happen the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth* Countess *De la Warr,* or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst,* if the person so succeeding to the Earldom of *De la Warr* was dead without issue male." Those are the ordinary words which point to a *toties quoties* succession. They are not limited upon the face of them to any particular ambit and extent of time, and it would, as it seems to me, be an entirely arbitrary construction so to limit them.

The next construction of the letters patent with which I am unable to agree was that which was put forward by Mr. *Fleming,* the learned counsel for the Petitioner, Mr. *Mortimer West.* He proposed to contend that the effect of the letters patent as a whole was this, that they created with regard to every person who was in the position of Mr. *Mortimer West,* a fresh dignity springing up entirely independent of the Barony of *Buckhurst* held by the previous taker, who succeeded to the Earldom of *De la Warr;* that it was unnecessary for your Lordships to consider what became of the Barony of *Buckhurst* in that previous taker; that all you had to do was to raise up a fresh title in the person indicated by this clause, as the person to take that fresh title, and to hold that he succeeded to the fresh title, whatever might become of the Barony of *Buckhurst* as previously held and enjoyed.

My Lords, the answer to that construction appears to me to be this. It is impossible to read these letters patent without, at all events, seeing that, as clearly as words can express it, they point from beginning to end to one Barony of *Buckhurst* and one only. The object of these letters patent is to create that one barony, and to mould and fashion its descent from one holder to another. It is clearly not the intention of these letters patent to create more

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baronies of *Buckhurst* than one, to leave a Barony of *Buckhurst*, as it were, outstanding in a person who has become Earl *De la Warr*, and to create, independent of that former barony, a new barony in the brother who comes next below the one succeeding to the Earldom of *De la Warr*. This interpretation, therefore, is an entirely fanciful one, and it is at once put aside when your Lordships look at the scheme of the letters patent themselves.

Then, my Lords, the next interpretation was one which was to some extent put forward by Mr. *Fleming*, and still more rested upon by the learned counsel, Mr. *Eddis*, who also appeared for the Petitioner. Mr. Lords, that construction was this: the learned counsel contended that the whole of this patent must be so moulded as to make it read, not as a grant of the barony of *Buckhurst* absolutely to each son of Lady *De la Warr* and the heirs male of the body of that son, but as a qualified grant to each son and the heirs male of his body for a certain length of time and under certain limitations, namely, so long as he had not become possessed of the Earldom of *De la Warr;* and the case was assimilated to cases of grants at common law to a man and his heirs, or to a man and the heirs of his body, lords of a particular manor, the manor, for example, of *Dale*.

My Lords, to that construction the answer appears to me to be extremely simple. In the first place, it is not consistent with the words of the letters patent. The words of the letters patent, as clearly as words can express it, grant the barony to each son and to the heirs male of his body, as a complete and perfect grant without any limitation in the words of the grant. The condition, be it valid or be it invalid, occurs in a subsequent part of the patent, obviously by way of defeasance of that which was previously granted, and not by way of indicating the extent to which the previous grant was to extend. But, my Lords, farther than that, even if this were to be read as in the first instance a grant to the second son of Lady *De la Warr* and the heirs of his body so long as he had not succeeded to the Earldom of *De la Warr*, the learned counsel entirely failed to shew that a grant of that kind could be consistent with limitations over from son to son. There is no instance in the books that we are aware of in which a fee simple, or a fee tail qualified in the way that I have mentioned, as by the

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addition of the words, "lords of the manor of *Dale*," is followed by a remainder to other persons upon the first takers ceasing to be lords of the manor.

But in addition to that, your Lordships perceive that there is in the present case another marked distinction which entirely distinguishes the case from the analogy suggested by the learned counsel. The case suggested is the case of a grant to a man and the heirs of his body lords of a manor. This is not the case of a grant to a man and the heirs of his body of a dignity so long as they are lords of a manor (if such a grant could be valid, as to which I express no opinion), but it is, according to the construction suggested, a grant of a dignity to a man and the heirs of his body so long as they are not possessors of some other estate or of some other dignity. Therefore, my Lords, I must entirely dissent from that construction also, and put it aside as a fanciful and an unreal construction when compared with the words of the letters patent, and a construction which would be invalid even if it had been contained in the letters patent in the form suggested.

My Lords, that being so, I ask what is the natural and obvious construction of the letters patent? And here I must ask your Lordships to observe the manner in which the letters patent are framed. There is, in the first place, a creation of the barony in favour of the late Lady *De la Warr* for life, with remainder to her then second son and the heirs male of his body, in default of such issue to the third son and the heirs male of his body, and so again to the fourth and the fifth. Up to that point you have the dignity given for life with estates in tail male in the strictest and most regular form in remainder. Then the patent continues, "willing and by these presents granting for us our heirs and successors that the said *Elizabeth*, Countess *De la Warr*, may bear and have the name, state, degree, style, dignity, title, and honour of Baroness *Buckhurst*, of *Buckhurst* aforesaid, and that after her decease the said *Reginald Windsor Sackville West* and the heirs male of his body aforesaid, and in default of such issue the third surviving son of the" Countess, "and the heirs male of the body of such third surviving son as aforesaid, and in default of such issue the fourth surviving son," "and the heirs male of the body of such fourth surviving son as aforesaid, and in default of such issue the fifth surviving son," "and the heirs male of the body of such fifth surviving son as aforesaid severally and successively may bear and have the said name, state, degree, style, dignity, title, and honour of Baron *Buckhurst*, of *Buckhurst* aforesaid, and that they and every one of them successively may be called and styled by the name of Baron *Buckhurst*, of *Buckhurst*, in our county of *Sussex*. And that she, the said *Elizabeth*, Countess *De la Warr*, may in all things" be treated and reputed as Baroness *Buckhurst*, and so on, repeating it with regard to all her sons and the heirs male of their bodies. And then "that the said Barons *Buckhurst*," passing over *Elizabeth*, Countess *De la Warr*, for obvious reasons, "that the said Barons *Buckhurst*, of *Buckhurst* aforesaid, and every of them successively and respectively, may have, hold, and possess a seat, place, and voice in the Parliaments, and public assemblies, and councils of us our heirs and successors within our United Kingdom of *Great Britain* and *Ireland* amongst other barons as barons of Parliament and public assemblies and councils. And also that the said *Elizabeth* Countess *De la Warr*, by the name of Baroness *Buckhurst*, of *Buckhurst* aforesaid, and after her decease the said *Reginald Windsor Sackville West* and the heirs male of his body" (then naming all the other sons) "successively may enjoy and use by the name of Baron *Buckhurst*, of *Buckhurst* aforesaid, all and singular the rights, privileges, pre-eminences, immunities, and advantages to the degree of a baroness or baron respectively in all things duly and of right belonging."

Now, my Lords, up to that point the letters patent are in the usual and ordinary form, a complete and entire grant to each of the sons in succession and the heirs male of his body, of the dignity of *Buckhurst*, limited in the usual way. The grant, if it stopped there, was in a form which was perfectly complete, and would have required nothing to be added to it; but then there comes the clause which, as I said before, is a clause of defeasance to a certain extent, cutting down and taking away that which had previously been granted: "We will and by these presents for us our heirs and successors do grant, declare, and provide that if the said *Reginald Windsor Sackville West*, or any other person taking under these our letters patent, shall succeed to the Earldom of *De la Warr*, and there shall, upon or at any time after the occurrence of such event, be any other younger son or any heir male of the body of such other son, then and so often as the same shall happen the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth* Countess *De la Warr*, or the heir who would be next entitled to succeed to the said dignity of Baron *Buckhurst* if the person so succeeding to the Earldom of *De la Warr* was dead without issue male."

Now, my Lords, there can be no doubt as to what these words mean. They are technical words, perfectly well known to the law. They are the apt and apposite words by which the shifting of an estate is produced when it is intended to shift from the first takers in consequence of the happening of some collateral event. The words are words of art, as to which there can be no doubt. No lawyer would have the slightest doubt as to the construction to be given to them. If you were to place this patent in the hands of any lawyer and ask him, putting aside all rules of law as to the mode in which a peerage can be limited: What is the way in which the peerage has been attempted here to be limited? he would answer without any hesitation,—The way in which it is attempted to be limited is this—to go in the male line of the sons of Lady *De la Warr*, but so that it shall shift from time to time as each of those sons or his issue becomes possessed of the Earldom of *De la Warr*.

Well, my Lords, if that is the construction of the letters patent, the question then arises, is that a result which can be attained in letters patent creating a dignity? Now with regard to an estate at Common Law, it is perfectly clear that there could be in the original limitation of the estate no shifting from person to person, by way of change of the ownership of the estate on the occurrence of a collateral event. The Common Law did understand one mode of putting an end to an estate which in the first instance appeared to be granted absolutely, that is to say, it understood the mode of terminating an estate by means of the annexation of a condition. If a condition was annexed to an estate, which otherwise would have been absolute, then on the happening of the condition the estate was defeated. But then, my Lords, it was not defeated for the benefit of a remainderman, nor could a remainder have been annexed to the condition; it was defeated or defeasible by and for the donor, who was entitled to enter for the condition broken.

My Lords, that was the state of things by Common Law. At the time that that was the state of things at the Common Law, it was found to be so inconvenient for the purposes of families, and in dealing with land, that there were introduced what were called Uses, which at the time of their introduction were analogous to what now are Trusts in the Court of Chancery. According to the doctrine of these uses, the owner of an estate holding it absolutely as an estate at Common Law, might have imposed upon his conscience a trust which might be made to shift about, and pass from owner to owner. After these uses had prevailed for some time the *Statute of Uses* was passed, and by it these uses were turned into actual legal estates. But your Lordships will observe that uses never could have had any application to a peerage, because they were originally trusts, and there could be no trust of a peerage, which was a personal possession, and could not be held by one person in trust for another. The *Statute of Uses*, therefore, could have no application to peerages; and, inasmuch as the shifting of estates could only be produced through the operation of the *Statute of Uses*, the doctrine of the shifting of estates under the *Statute of Uses* could not apply to the case of peerages.

My Lords, the result therefore is this:—you have here letters patent dealing with a peerage upon the principle of the shifting of estates by way of use; that is a mode in which I have no hesitation in saying you cannot deal with a peerage; and putting aside, as indeed it was admitted at the Bar that you must put aside, the principle of the shifting through the operation of the *Statute of Uses*, the simple question your Lordships have to consider is, supposing this to be a grant at Common Law, could you have engrafted upon estates limited in succession in tail a proviso determining those estates upon a collateral event, and professing to give them over before the natural termination of the estates? My Lords, the answer to that question must be that it could not be done, and therefore I arrive at the conclusion that dealing with this proviso upon those principles upon which we must deal with it, it is one which could not have effect given to it.

My Lords, I do not propose to consider in any detail the numerous cases which were referred to and which were said to be precedents for a limitation of this kind. As to all of them I should say that the idea that they are precedents is at once dispelled when the cases are considered even in the most cursory manner. So far are they from being precedents, that there are only two of them to which I feel it necessary to make the least reference in the observations I have to make to your Lordships.

My Lords, it was said that the manner in which the Duchy of *Cornwall* is regulated in its descent, in relation to those who hold it, afforded an instance analogous to what is contended for in the present case. As I view the case of the Duchy of *Cornwall* it has no analogy whatever. Your Lordships will bear in mind that what is necessary to be shewn for the Petitioner in the present case is, some instance in which in its creation the natural descent of an estate is interrupted by a provision in the instrument of grant. Now, is that the case with the Duchy of *Cornwall?* My Lords, I do not so understand it. The Duchy of *Cornwall*—and here I care not whether it is limited under Act of Parliament or not—if it is limited by virtue of Act of Parliament the case is still more inapplicable to the present, but I will assume for the moment that it is not limited by the authority of Parliament, though I am very far from thinking that that is the case. The Duchy of *Cornwall* is held by the Prince of *Wales* for the time being—the Prince of *Wales* becomes the sovereign of the country—becoming the sovereign of the country, it is impossible that he can hold any other dignity. The fountain and source of all dignities cannot hold a dignity from himself. The dignity, therefore, as a dignity to be held by the sovereign terminates, not by virtue of any provision in its creation, but from the absolute incapacity of the sovereign to hold a dignity. That being considered, the Duchy of *Cornwall* case ceases to be any authority for the only purpose for which it could here have been useful. It could only be useful for the purpose of shewing a means, in the instrument of creation, of terminating a dignity. What becomes of the Duchy of *Cornwall* is immaterial for the purpose of the present case. In point of fact, what appears to be considered is, that according to a constitutional and a very intelligible practice, the succession is in a manner accelerated—the sovereign being out of the case his eldest son has the succession accelerated so that he becomes Duke of *Cornwall.*

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My Lords, the only other instance which I think it necessary to refer to is the instance of an eldest son of a member of your Lordships' House holding a higher peerage, being called up to the House, according to the ordinary phraseology, in his father's barony. That is a practice depending, I should say, very much upon constitutional usage. What is the particular explanation of that usage, or what is the particular definition of the position which the eldest son occupies, it appears to me to be quite unnecessary now to consider in detail, for this reason, that there again, as in the Duchy of *Cornwall* case, the only purpose for which these instances could have the slightest relevancy to this case would be, if it could be shewn that they are cases in which the Crown, in the original instrument of creation, has provided for the termination of a dignity actually granted to and actually enjoyed by a member of your Lordships' House. No one has pretended to say that the son of a peer, holding a higher title, is called up to this House by virtue of some provision in the instrument originally creating his father's barony. If it is done validly, as we know it is, it is done by a usage which has sprung up and been recognised, and so become part of the constitutional usage of the country.

My Lords, the only other observation I have to make to your Lordships is this: a suggestion was made—I think it was by the Attorney-General—that it might possibly become necessary to consider whether, if this proviso at the end of the letters patent could not have effect given to it—if it was invalid—that to any extent interfered with the general validity of the letters patent. My Lords, I cannot advise your Lordships that the invalidity of the proviso has any effect whatever upon the validity of the letters patent generally. On the contrary, as your Lordships will have observed when I read the letters patent to you, they contain a complete and independent grant of the dignity in the usual and valid manner. That stands unaffected by, and not requiring the aid of, the proviso to which I have particularly referred. The proviso, if valid, might have affected the estates previously given, but, if invalid, leaves those estates entirely unaffected, and does not impose any invalidity whatever upon the letters patent generally.

My Lords, upon the whole I should advise your Lordships to offer, in the usual way, in answer to the reference which has been made to you by Her Majesty, your opinion in the form of resolutions; and the resolutions which I would propose as the mode of expressing your opinion would be four in number, namely: 1. That on the death of *Elizabeth,* late Countess *De la Warr,* who was created Baroness *Buckhurst* by the letters patent of the 27th of April, 1864, the Petitioner *Reginald Windsor,* her then second son, succeeded to the said Barony of *Buckhurst* as a barony descendible to the heirs male of his body. 2. That the said *Reginald Windsor,* Baron *Buckhurst,* was accordingly summoned to this House, and took his seat under the said letters patent and summons. 3. That the said barony to which the said *Reginald Windsor* so succeeded did not, under or by virtue of the declaration and proviso in the letters patent, cease or determine on the succession of the said *Reginald Windsor* to the Earldom of *De la Warr.* 4. That the Petitioner *Mortimer Sackville West,* the third son of the said *Elizabeth,* Countess *De la Warr,* has not established his title to succeed, under and by virtue of the said declaration and proviso, to the said barony.

LORD CHELMSFORD :—

My Lords, the title of the claimant, *Mortimer Sackville West,* depends entirely upon the validity and effect of what is intended to be a shifting clause in the letters patent creating the Barony of *Buckhurst.* I say the effect as well as the validity of this clause, because the clause is in my opinion good in itself, and yet in the events which have occurred it is incapable of operating to give the barony to the claimant.

Mr. *Fleming* argued for the claimant that it was not a shifting clause at all, but that upon a Baron *Buckhurst* becoming Earl *De la Warr* there was a new grant of a Barony of *Buckhurst* to the person nominated in the letters patent as next in the order of succession. To explain what I mean in saying that the clause is good in itself, and might in a particular event have had its operation, suppose *Reginald West* had become Earl *De la Warr* in the lifetime of his mother, and therefore before he had succeeded to the Barony of *Buckhurst,* I apprehend, notwithstanding the opinion of the Attorney-General to the contrary, that upon the death of *Elizabeth,* Countess *De la Warr,* the barony would have devolved upon *Mortimer Sackville West* as *persona designata*, he being in the words of the letters patent the son who would be next entitled to succeed if the person succeeding to the Earldom of *De la Warr* was dead without issue male. But it appears to me that, *Reginald West* having succeeded to the Barony of *Buckhurst*, it cannot be taken from him and given to another, but must continue in him and the heirs male of his body, and only in the event of the failure of such issue will go in the order of succession marked out by the grant—to the sons successively of *Elizabeth*, Countess *De la Warr*, and the heirs male of their bodies.

The learned counsel for Mr. *Mortimer West*, in encountering the difficulties which were thrown in his way during his argument, was almost unavoidably led into some inconsistencies. At one time he maintained that the instant Lord *Buckhurst* became Earl *De la Warr* he ceased to be Lord *Buckhurst*. But he preferred to rely as the ground of his argument upon his construction of the clause that it did not shift the barony of *Buckhurst* upon the Earldom of *De la Warr* coming to the holder of the barony, but that, upon that event, there was a creation of a new Barony of *Buckhurst*. Upon being asked whether in this state of things there would be two Baronies of *Buckhurst*, he declined to answer the question, saying it was immaterial to his argument. He did however endeavour to shew that there would be nothing unusual in two persons sitting by the same title by citing cases of grants of peerages in succession, and of an eldest son being summoned to the House by one of his father's titles. It seems to me unnecessary to enter into an examination of these cases, because even supposing they established what they were alleged to prove (which I am not disposed to admit) they would have no bearing upon the present case, which depends entirely upon the words of the letters patent.

From these it seems to me impossible to contend successfully that there was, or was intended to be, more than one Barony of *Buckhurst* which alone is dealt with in the clause in question. I will not detain your Lordships by again reading the shifting clause which you have heard so often. If the object of this clause is to prevent the dignities of *De la Warr* and *Buckhurst* being held together by the same person, and if this is to be effected by taking from a Lord *Buckhurst* who becomes Earl *De la Warr* his dignity of *Buckhurst* and giving it to another person, I do not scruple to say that the Crown has no power to grant a dignity with such a shifting and transferable quality. No dignity of a peer can be transferred or surrendered nor can it be taken away except by Act of Attainder and (as was admitted in the argument) the Crown cannot create a dignity with a limitation or condition unknown to the law. But to grant a dignity with a provision that in case the grantee shall succeed to another dignity he shall cease to hold the created dignity, which shall thenceforth devolve upon another person, that is to give it a transferable quality which by law cannot be annexed to it, and to deprive the grantee of the dignity vested in him which in its essence is incapable of a determination during the life of the holder except by Act of Attainder.

I agree with my noble and learned friend that Mr. *Mortimer West* has failed to establish his claim to the Barony of *Buckhurst*, and that the Committee ought to adopt the resolutions which he has proposed.

LORD HATHERLEY :—

My Lords, looking at the construction of this patent, if we were to apply the words here used to limitations of real estate there cannot be a doubt of what the construction of the instrument ought to be. In the first instance, there is a series of limitations, after the estate for life in Lady *De la Warr*, to the second son and, following successively, to the several younger sons of Lady *De la Warr*, with successive estates tail in each, each in expectancy awaiting the regular termination of the estate tail which preceded it. Then there comes the clause which has been so frequently read that I will not trouble your Lordships by reading it again. That clause provides that in the event of the first and other takers, as it appears to me, all of them, *toties quoties*, becoming Lords *De la Warr*, the estate is then to pass on to the next succeeding son in tail. Now if that were a limitation of real estate there cannot be a doubt of what it must be held to be. It would be a series of estates tail with conditional limitations over, which conditional limitations over could not take effect at Common Law because, as is well explained by Mr. *Butler*, in a note to *Fearne's* Contingent Remainders, which I referred to during the argument; a condition which determines before its natural termination the previous estate limited, must operate by way of conditional limitation, and cannot operate by way of remainder. And he put the very case which has been very often put in the course of the argument before your Lordships, namely, if there be a limitation to *A.* and the heirs male of his body so long as they are lords of the manor of *Dale*, and then a remainder over, that is a contingent remainder and not a conditional limitation. If it be to them and the heirs of their bodies one after another successively (as we have it here) with a proviso defeating each estate in each successive holder in the event of his ceasing to be lord of the manor of *Dale*, that is a conditional limitation which cannot take effect except through the *Statute of Uses.* He makes the observation that the distinction appears to be a very fine one, but he considers it to be a distinction that is established.

Now, my Lords, if that be so, it is quite clear that, inasmuch as for the reasons which were assigned by the noble and learned Lord who first gave his opinion to your Lordships in this discussion, the *Statute of Uses* is not applicable to the case of a dignity, of course this limitation over could take no effect.

But Mr. *Fleming* brought before our consideration the rule which has been laid down with reference to the construction of instruments, namely, that if they can be so construed as to operate by way of remainder, they shall be so construed in preference to being construed as shifting or springing uses, or the like. That is very true. But the moment you read this patent you see that the whole frame and object of it is to give successive estates tail to those who are described in the series of limitations, the second, the third, and the other younger sons; and then there is an enabling clause which enables them all exactly in the manner in which they are varied in the respective limitations; and interposed between the two is that shifting clause, which I apprehend, according to the proper and reasonable construction of the instrument, we must construe as simply what it professes to be, a clause determining the previous estates in the event there mentioned, namely, the event of the holder of the *Buckhurst* title succeeding to the Earldom of *De la Warr.*

My Lords, if that were not so great doubt, I think, would arise upon the very frame of this patent, if it was to be taken in the sense in which Mr. *Fleming* wishes us to take it, namely, as being in the first instance a limitation not subject to a condition which is to defeat it, but a limitation pointing out the duration of the first estate created, that is to say, a limitation to each of the persons named and the heirs of their bodies so long as they shall not be Earls *De la Warr.* He says that measures their estate and interest; but there he appears to me to fall into another difficulty, namely, that he would find it impossible (indeed it appeared so in the course of the argument) to find any authority or precedent for any such creation of a peerage, a creation of a peerage which is to pass away from the grantee or his heirs on their ceasing to be lords of a manor, or possessors of a given estate, or, according to the suggestion in the present case, Earls *De la Warr, and to be given over in that event to a third person.* I add the latter sentence because I bear in mind the *De L'Isle Case* (1), which has been cited in the course of the argument by Mr. *Fleming*, and which appears to give some countenance, in the first instance, to the notion that the Crown can create a peerage to be held so long as the holder is entitled to a particular manor or a castle or the like.

I think it is a sufficient answer to Mr. *Fleming's* argument, founded upon the *De L'Isle* case, to say, in the first place, that, in that case, the estate in the dignity was not carried over to any one else; and, therefore, that precedent would not assist the Petitioner in the present case. But, independently of that, I think it is quite clear that you must look at that case in the light, and with the cognisance, of all the view of the law entertained by your Lordships' House at that time. Undoubtedly at that time it was not settled, indeed it was not finally settled, I think, until the *Berkeley Case* (2), that there was no such thing recognised in your Lordships' House as a barony by tenure, that is to say, merely by virtue of the possession of certain property. A notion was afloat

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(1) Report by Sir H. Nicolas, 1829.

(2) 8 H. L. C. 21. 8 Jur. N.S. 21.

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that that which prevails in the greater part of *Europe*, I believe, namely, that titles of honour are attached to certain properties (1), and may be held when so attached by any person acquiring the property, might exist also in this country. That is a notion of which at one time there may be found traces in our law books as being a portion also of our English law. That, in a great degree, I imagine would account for the case of the *Barony of De L'Isle*. There are other singular circumstances which I do not pause now to follow up connected with the creation of the Barony of *De L'Isle* first and the viscountcy afterwards. But it is quite sufficient to say that that grant does not affect to do more than determine the barony when the tenure of the property came to an end—when the lordships of the manor of *Kingston L'Isle* had been disposed of—and does not affect to carry over the barony to any other third person upon such an event taking place.

My Lords, I shall not go into the various other cases which Mr. *Fleming* cited, because really not one of them comes near to the present case. Having said what I have about the barony of *De L'Isle*, I think the only case which required any answer upon that particular head has been disposed of.

But Mr. *Fleming* has called to our attention the usage—for it is dependent wholly upon usage—the usage on the part of the Crown on the one hand, and (as regards the recognition of the title so created) on the part of your Lordships' House on the other, of calling up the eldest son of a peer by one of the titles vested in his father. Mr. *Fleming* has cited that as an instance of a creation analogous to that which he contends for in the present case. So far from that, the operation there is the very reverse of the operation attempted to be performed here. The operation in that case is calling upon an eldest son by the acceleration, as it were, of his title in one of the dignities vested in his father, the title continuing in the family, the old barony being in no way destroyed; so that if the son so called up died without leaving issue, it would go to his collaterals in the same way as the original barony would have gone to him and his brothers in succession. Now, in the present case, what is contended for is that the letters patent are so framed that instead of accelerating the title of the eldest son in the barony held by his father, they entirely destroy the barony originally held, and carry over the title to a younger brother of the father, to the entire destruction of the title in the elder branch of the family, although that elder branch of the family has descendants still in existence. It appears to me, my Lords, that no two cases could be more unlike one another than that case and the present.

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(1) Is there not this great distinction between titles of nobility in *England* and abroad, that the former give a right to a seat in the Legislature, while the latter are mere personal distinctions of nominal rank, no Legislative body of any sort existing in some of the countries where they are known?

My Lords, I apprehend that, ever since the *Wensleydale Case* (1) at least, it has been your Lordships' wont, when anything unusual appears on letters patent, to require strict proof of there being either a precise precedent exactly on all fours with the case which is before your Lordships for consideration, or to say the least of it (though I do not remember a case going so far as that), you require to see that there is a case with an analogy so strong, so striking, and so convincing, that the two cases could not be in substance separated. That has been the course continually pursued by this House; certainly the course has not been to enlarge the usages by making new precedents in cases of this description. There are instances in which what was formerly allowed by the House in the way of usage appears to have dropped altogether out of the usage of the House at the present day. I will mention two instances of that. One is a barony by tenure, of which some traces appear in former times, and the other is a barony by courtesy, which has wholly dropped out of usage now.

I apprehend that your Lordships would ask from Mr. *Fleming* the citation of a case bearing such a strong resemblance to that which we have to consider upon the present letters patent as to induce your Lordships to say that it was an example which might be followed. Mr. *Fleming* has entirely failed to produce a single instance bearing any such resemblance. I have gone very carefully through the cases he cited, and I heard his observations with equal care and attention, and I have come to the conclusion that

(1) 5 H. L. Cas. 958.

the present patent is one which is defective in one particular portion—in that clause which attempts to defeat the previous limitations (which are all in the ordinary form of the creation of a peerage), and which interferes with the concluding portion of the patent (which ennobles the blood in the usual form), and which by a process, unknown to the law of the land in respect of the form of the limitation, and unwarranted, by usage, in respect of the usages of your Lordships' House, attempts to deprive a noble person in whom a peerage has become vested, and who is so ennobled by the express declaration of the letters patent, of that title and interest which he has so acquired.

LORD O'HAGAN:—

My Lords, it has been argued that Lord *De la Warr* is estopped from asserting the claim he prefers and denying the claim which he resists. But this is a misconception. The doctrine of estoppel cannot, in such a case, affect the existence of a peerage. The conduct of parties cannot validate letters patent which are legally void. We are concerned not merely with the personal pretensions of the individuals in conflict before us; but with the highest interests of your Lordships' House and of the law of the land, with which Royal grants to be effective must be in harmony.

We are bound to advise Her Majesty according to our view of the legal and constitutional merits of the matter she has been pleased to refer for our opinion; and to me it appears that the contention on behalf of Mr. *Mortimer West* is wholly without sanction in precedent or principle. If Mr. *Fleming* could have succeeded in establishing the proposition which he felt to be essential to his argument, and maintained consistently throughout it, that upon the true construction of the letters patent his client might claim the Barony of *Buckhurst*, not by force of a shifting clause, but of a new and independent grant, he would have gone far to command the assent of your Lordships. But that proposition is not maintainable. The plain meaning of the words contradicts it. Mr. *West* must take the "succession," if at all, as "devolving" upon him from a previous possessor, and the "devolution" must be of the same thing, passing from one person to another. If he be entitled to the dignity created by the patent, it must shift from his brother to himself on the realization of a contingent and collateral event. For sustaining such a title no authority has been furnished.

At Common Law an estate so constituted would be void; and the attempt to create it in the devolution of landed property would be necessarily defeated. The *Statute of Uses* might be invoked to support such an estate; but confessedly it has no application to the grant of a peerage, which is not affected by the doctrine of trusts, and it cannot be prayed in aid to assist that grant if otherwise ineffectual. The effect has been to confer a title hitherto unknown to the law; and if we cannot adopt the construction on which alone it could be validated it fails altogether. If the claimant cannot rest on a new creation a shifting and conditional possibility avails him nothing.

In all the cases, so far as I have been able to appreciate their effect, the new estate which was held valid followed after another estate which had previously been ended; and in this respect they are wholly different from that before us. And as to the practice so much relied on of calling up the sons of peers to your Lordships' House, the distinction seems equally clear in this, that the sons are summoned by writ, and so have no estate in the peerage freshly vested in them. There is no real shifting. The royal act of summoning by a new writ does not become effectual from the "devolution" of a prior dignity.

No real precedent has been produced, save perhaps the *Cromartie Case*. But that is very recent. It has not the prestige of antiquity. It has not been the subject of debate, and it cannot be held to govern or to guide your Lordships as to the construction and effect of the letters patent with which you have now to deal. The case of the *Duchy of Cornwall* (1), the *De L'Isle Case* (2), and other cases cited as analogous to this, have already been sufficiently disposed of by my noble and learned friends, and I should merely waste time by a fresh discussion of them. I shall only say that not one of them, in my opinion, really touches the novel and peculiar question we are invited to decide.

(1) *The Prince's Case*, Co. Rep. pt. viii.

(2) Report by Sir H. Nicolas, 1829.

Your Lordships are asked, after the lapse of many centuries, to validate for the first time a claim without precedent, in a matter which is especially to be regulated by ancient and established usage. You are asked to pronounce in favour of a title which could not be supported at Common Law, and cannot be helped by statute. You are asked, contrary, as I conceive, alike to principle and policy, to take from a peer a barony which has been vested in him, and in right of which he has sat and voted, and while he is still alive to transfer it to another. And you will scarcely be encouraged to sanction such an innovation, by the reflection that no one can anticipate without apprehension the possible, however improbable, consequences under circumstances conceivable, though most unlikely to occur, of permitting conditional and shifting peerages to be made the instruments of injurious interference with the honour and independence of your Lordships' House.

The following Resolutions were then agreed to:—

1. That on the death of *Elizabeth*, late Countess *De la Warr*, who was created Baroness *Buckhurst* by the letters patent of the 27th of April, 1864, the Petitioner, *Reginald Windsor*, her then second son, succeeded to the said barony of *Buckhurst*, as a barony descendible to the heirs male of his body:

2. That the said *Reginald Windsor*, Baron *Buckhurst*, was accordingly summoned to this House, and took his seat under the said letters patent and summons:

3. That the said barony, to which the said *Reginald Windsor* so succeeded, did not, under or by virtue of the declaration and proviso in the letters patent, cease or determine on the succession of the said *Reginald Windsor* to the Earldom of *De la Warr*:

4. That the Petitioner, *Mortimer Sackville West*, the third son of the said *Elizabeth*, Countess *De la*

Warr, has not established his title to succeed, under and by virtue of the said declaration and proviso, to the said barony.

It was ordered, That these resolutions be reported to the House.

They were so reported on 20 *July, and agreed to.*

Lords' Journal, 20th July, 1876.

Solicitors for Hon. *Mortimer Sackville West: Meynell & Pemberton.*

Solicitors for Earl *De la Warr: Cope & Co.*

Solicitor for Crown: *Solicitor of Treasury.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1876
March 23.

ANGUS MACKINTOSH OF HOLME, IN THE COUNTY OF INVERNESS . . . . APPELLANT;

HER MAJESTY'S ADVOCATE FOR SCOTLAND . . . . RESPONDENT.

Court of Judiciary—Its Jurisdiction unappealable.

An appeal to the House of Lords does not lie from any sentence or order of the High Court of Justiciary in *Scotland.*

Per THE LORD CHANCELLOR (1):—The sentences and orders of the Court of Justiciary are by statute made final and conclusive.

Per LORD HATHERLEY:—I am clearly of opinion that this House is not a Court of appeal from the Justiciary Court in *Edinburgh.*

Per LORD O'HAGAN:—No such appeal has ever been admitted by the House, although several cases have been the subject of discussion at this Bar.

ON the 22nd of February, 1872, the above Appellant asked the concourse of the Lord Advocate (2) to a bill for presentation to the High Court of Justiciary against Dr. *Thomas Weir*, a physician in *Edinburgh*, who was charged with having entered into a conspiracy in 1852 for the purpose of obtaining the detention of the Appellant in a lunatic asylum. The Lord Advocate refused his concourse. On the 16th of March, 1872, the Appellant presented a bill to the Court of Justiciary praying their Lordships to ordain the Lord Advocate to grant his concourse or to permit the Appellant to proceed at his own instance. On the 20th of May, 1872, the Court of Justiciary refused the prayer of the bill. On the 13th of July, 1872, the Appellant petitioned the Court of Justiciary to order the Lord Advocate's concourse, or to permit the Appellant to proceed without it. On the 4th of November, 1872, the Court of Justiciary refused the prayer of the Appellant's petition (3). On the 28th of July, 1874, the Appellant gave notice to the Lord Advocate of his intention to appeal to the House of Lords against the interlocutors of the 20th of May and the 4th of November, 1872; in consequence of which intimation the Lord Advocate presented a petition to the House against the reception of the appeal. The appeal having been offered for presentation, the House, on the 7th of August, 1874, ordered that both the appeal and the petition against its reception should be referred to the Appeal Committee "to consider whether the said appeal was proper to be received."

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(1) Lord *Cairns.*

(2) Now Lord *Young*, a Judge of the Court of Session.

(3) Couper's Justiciary Rep. vol. ii. p. 250.

On the report of the Appeal Committee the House ordered that "the matter of the Lord Advocate's petition be argued by one counsel of a side as a preliminary point; and that the parties respectively do lodge printed cases, confined to the question of competency of the said appeal."

The printed cases were accordingly so lodged; and on the 23rd of March, 1876, *The Lord Advocate* (Mr. *Gordon*, Q.C. (1)) appeared at the Bar in support of his own petition; Mr. *Hemming*, Q.C., being the sole counsel of Mr. *Mackintosh*, who had offered his appeal, and who, in the following argument, is called the Appellant.

The Lord Advocate thus addressed the House:—My Lords, the Court of Justiciary has cognizance of crimes, and has nothing to do with civil matters; and the Lord Advocate is the party at whose instance any prosecution is directed. When he thinks proper to advise a prosecution against any individual, the form resorted to is what is called an indictment, in which the person is charged with the offence, and the Lord Advocate is the prosecutor. There is another course which may be adopted, that is to say in theory is recognised, but in practice is never resorted to, that is, that the private person against whom an offence has been committed may prosecute also; but in that case it is required that the consent of the Lord Advocate, or the "concourse," as it is expressed, should be given.

What was done in the present case by the Appellant was this: he presented a petition to the Court of Justiciary. The substance of that petition stated:

> That having some time ago prepared a bill for criminal letters, in order to the prosecution of Dr. *Graham Weir*, for conspiracy and other crimes, your Peti-

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(1) Now Lord *Gordon*.

tioner, on or about the 22nd day of February, 1872, applied to *George Young*, Esq., Her Majesty's Advocate, to the end that he might grant his concourse. That your Petitioner received an answer from Mr. *James Shillinglaw*, clerk to the Crown Agent (who represents the Lord Advocate in criminal matters) stating that he was directed by the Lord Advocate to inform the Petitioner that his Lordship was of opinion that it was not fitting that he should grant his concourse to such a prosecution, and that his Lordship therefore refused his concurrence.

Then another petition was presented to the Court of Justiciary, and an opportunity was given to Mr. *Mackintosh* of submitting to the Lord Advocate any explanation why he had been so long in adopting the course which he was now proposing to do, the alleged offence having been committed in 1852, just about twenty years before; and it appears that no satisfactory explanation was given to the Lord Advocate, and therefore the second petition was presented, the Court having held that the first petition was incompetent. That second petition says:

That on the 19th of March, 1872, your Petitioner presented to your Lordships a petition and complaint; that your Lordships ordered it to be served on Her Majesty's Advocate, and this having been done, parties were heard on the same on the 20th day of May, when, at the conclusion of the proceedings, the Lord Justice General stated that the prayer of the petition stood dismissed in the meantime, but that if your Petitioner had any further information upon which he thought the Lord Advocate ought to be induced to come to an opposite conclusion from that at which he had then arrived, it was quite open to your Petitioner to approach the Lord Advocate again; that, in consequence of the above direction, your Petitioner prepared full information and explanations for the Lord Advocate, which were forwarded to the Crown Agent on the 4th day of July current; that on the 9th day of July current your Petitioner received a letter from the Crown Agent, dated the previous day, in which it is stated that the paper of information and explanations has been submitted to the Lord Advocate, and, after duly considering it, his Lordship is of opinion that it is not fitting that he should direct criminal proceedings at the public instance against Dr. *Graham Weir*, or grant his concurrence to the bill for criminal letters which your Petitioner presented to your Lordships; that from the information and explanations submitted to the Lord Advocate his Lordship ought to have been induced, either to institute criminal proceedings at the public instance, or to grant his concourse to the bill for criminal letters referred to. May it therefore please your Lordships to take into consideration the information and explanations which have been laid before the Lord Advocate, and to ordain him either to institute proceedings at the public instance, or to grant his concourse to a private prosecution at your Petitioner's instance, or otherwise, if the Lord Advocate should persist in his refusal, then to grant your Petitioner leave to prosecute at his own instance without the Lord Advocate's concourse.

The Court, having heard parties, or rather heard the Petitioner in person, refused the prayer of the petition. The Lord Advocate "denied that the Court of Justiciary had any jurisdiction to control his exercise of the discretion of granting his concourse to a prosecution," and on the 7th of August, 1874, Mr. *Mackintosh* presented the present appeal to your Lordships.

THE LORD CHANCELLOR:—So that it is not an appeal from a judgment, even from a criminal judgment; it is an appeal from a refusal by the Lord Advocate to grant the Appellant leave to prosecute.

LORD CHELMSFORD:—It is an appeal from the exercise of discretion by the Lord Advocate.

The Lord Advocate:—Yes, my Lords.

LORD CHELMSFORD:—Has there ever been a case in which there has been an appeal, if we may so call it, from the exercise of discretion by the Lord Advocate?

The Lord Advocate:—I have never heard of one. I recollect, about forty or fifty years ago, a gentleman insisted upon having a private prosecution for an assault, and he required the concurrence of the Lord Advocate. In that case the Lord Advocate gave his concurrence, but the result was an acquittal. But under these circumstances a man is put upon his trial as a criminal, which is an offensive proceeding, if the Lord Advocate is clearly of opinion, and if that be his firm conviction, that there are no grounds for putting him in that position. The result was, as I have stated to your Lordships, in that particular case unfavourable to the prosecution, as might have been expected; and I have never heard of a case of the kind since.

Now, the proceedings in the Court below which led to this appeal your Lordships will find in vol. ii. of *Couper's* Justiciary Reports, page 237. I may refer to that report as shewing what was the nature of the proceeding proposed to be taken by the Appellant, and to which the Appellant required the consent, or the concourse, as it is called, of the Lord Advocate:

> That albeit by the laws of this and every other well-governed realm conspiracy for the purpose of obtaining the detention as a lunatic in a lunatic asylum of a

person known not to be insane, or to acquiesce in the detention in an asylum of a person known not to be insane, as also the maliciously granting by a doctor of medicine of a false certificate as to the mental condition of any person, well knowing said certificate to be false, for the purpose of obtaining the detention of said person in a lunatic asylum as a lunatic; and especially when, in consequence of the granting of such certificate, a person not insane is placed in a lunatic asylum, and confined therein as a lunatic; as also slander, or the wilfully, maliciously, feloniously, and corruptly accusing a sane person to the authorities as being a furious or fatuous person or lunatic, or as being in such a state of mental derangement as to require confinement in an asylum, for the purpose of perverting public justice, and injuring the person so accused in feelings and reputation or liberty, the accuser (that is, the medical man) well knowing the falsehood of the accusation, in consequence of which accusation the person is committed to an asylum by a sheriff or other judge, and detained therein for a considerable period, and more especially when such accusation is made corruptly, and in consideration of a money payment, as also culpable violation or neglect of duty by a medical person, employed to sign or give a certificate or report as to the mental condition of any of the lieges, to be laid before a sheriff or other judge, for the purpose of enabling said sheriff or other judge to satisfy himself as to the propriety of granting an order for his removal into a house kept for the reception and confinement of furious or fatuous persons and lunatics, and his detention therein, whereby said sheriff or other judge is induced to grant a warrant for his removal to, and his detention in, said house, under which warrant he is removed to and detained therein accordingly; as also the culpably and recklessly signing or giving by a medical person of such certificate or report, to the effect that any of the lieges is in such a state of mental derangement as to require him to be confined in a lunatic asylum, without having carefully examined the person to whom it relates, and without having endeavoured to ascertain in a proper manner by such examination or otherwise that such person is a furious or fatuous person or lunatic, and proper to be confined in a house for the reception of such persons, whereby a waraant is obtained for confining said person in a lunatic asylum, under which warrant he is confined therein accordingly, are crimes of an heinous nature and severely punishable.

Observe the word "crimes." The Petitioner does not set forth any civil interest, and I make that observation before your Lordships, because I see it stated in his appeal case that he is deprived of a civil right.

The Lord Chancellor:—This litigation has been in this House before—has it not?

The Lord Advocate:—There have been three appeals connected with this unfortunate case; the first being against a verdict of a jury acquitting Dr. *Weir* of the alleged improper proceeding; after that two subsequent cases connected with other parties were taken up by an appeal to your Lordships' House. You will observe that what he makes his appeal about, according to his own statement, is certain alleged crimes—he does not allege any civil interest, and he says that these offences are "crimes of an heinous nature and severely punishable."

Lord O'Hagan:—If it were a civil matter, the Justiciary Court would have nothing to do with it?

The Lord Advocate:—Exactly so. The result is this. After setting forth the circumstances, it is said

> All which, or part thereof, being found proven by the verdict of an assize, or admitted by the judicial confession of the said *Thomas Graham Weir* before a Court of Justiciary, the said *Thomas Graham Weir* ought to be punished with the pains of law, to deter others from committing the like crimes in all times coming. Therefore, I beseech your Lordships for criminal letters, at my instance, in the premises, containing warrant for citing the said person complained upon in common form.

The Court heard the explanations of the Lord Advocate (my predecessor in office) upon this matter, and your Lordships have the opinions of the Court in this report dealing with the matter of the discretion on the part of the Lord Advocate. That I do not hold to be at present necessarily before your Lordships, further than that it may be satisfactory for your Lordships to see what was the course of procedure on the part of the Court, and how the application which is now before your Lordships was dealt with by the Court. Mr. *Watson* was the counsel representing at that time the Appellant, Mr. *Mackintosh*. The Court inquired of Mr. *Watson* what were the civil proceedings referred to by both parties, and reference was made to *Mackintosh* v. *Fraser and Others*, decided in the House of Lords on the 20th of April, 1865; and also to *Mackintosh* v. *Smith and Lowe*, decided in the House of Lords in 1864; and also to *Mackintosh* v. *Arkley*.

The Lord Chancellor:—Are those cases reported?

The Lord Advocate:—Yes, my Lord. I am quoting from 2 *Couper*, p. 250.

The Lord Chancellor:—Will you give me the reference to the House of Lords Reports?

The Lord Advocate:—*Mackintosh* v. *Fraser* is reported shortly in 1 *Macpherson*, p. 37.

THE LORD CHANCELLOR:—And what is the other?

The Lord Advocate:—The other is in 2 *Macpherson*, pp. 389, 1261; and the third, the case of *Mackintosh* v. *Arkley*, is 6 *Macpherson*, p. 141. It is said that it was in consequence of these civil proceedings, which were in dependence, that the Appellant had not sooner made his application to the Court for the criminal proceedings which he now asked them to allow under the application which was then before the Court. The question before your Lordships is not really at present as to the absolute discretion of the Lord Advocate, or as to whether he exercised his discretion judiciously or properly in the present case in refusing his concourse; but the question is whether there is an appeal at all competent from proceedings taken in the Justiciary Court which has cognizance of criminal procedure alone, and which is not entitled to interfere with the civil interests of parties.

Mr. *Hemming*, Q.C.:—Your Lordships will find them at pp. 251 and 254 of 2 *Couper*.

The Lord Advocate:—Turning to p. 251 of 2 *Couper*, I find that the Lord Justice Clerk said:

> This case has been fully and learnedly argued to us on the part of the complainer, on the ground that if the Lord Advocate refuses his concurrence, it is the right of the private party to be allowed to insist in his prosecution; and he has applied to the Court alternatively either to have the Lord Advocate ordained to concur or to be allowed to proceed without his concurrence. We appointed the application to be served on Her Majesty's Advocate, and we have to-day heard a statement from him in regard to his refusal of his concourse. He states in substance that he did not consider this to be a case in which he ought to give his concurrence. He has to some extent explained the grounds of his opinion, and we are now to consider how we are to dispose of this application. There are two questions involved: first, whether the Petitioner is entitled to be allowed to proceed; and, secondly, if he have no such absolute right, whether the Court are now to assume the functions of the prosecutor, and inquire into the grounds on which the prosecution rests. On the first of these questions, after carefully considering the authorities and the institutional writers, I entertain no doubt. It may be that the function and intervention of the Lord Advocate have been engrafted on powers originally vested in Court. But it is a practice of centuries, by which certain powers have been vested in that public officer, most salutary for

the public interest, and very conducive to the unembarrassed discharge of our judicial duty. The necessity of obtaining the concourse of the Lord Advocate now rests on very well established grounds, whatever may be the historical origin of his powers. It operates two very important results. His concourse is not a mere form, but makes him master of the process, so that he can directly intervene to secure due procedure and to prevent collusive acquittal. He is entitled to refuse his concourse, and has the important function of limiting the right of private prosecution and preventing oppressive proceedings. I consider these to be most essential to the due exercise of the functions of the public prosecutor. It is plain that these important objects could not be attained if the concourse be a mere matter of form; and that the protection of the public as regards both of them would be entirely lost were this the law. In the passage in *Hume*, to which we were referred, and which is not expressed with the author's usual precision, it seems to be suggested that the Lord Advocate is not entitled to consider the merits of the private prosecution. I doubt whether Mr. *Hume* meant to express that as his own opinion, but the argument in the more recent case of *Hare* certainly does not sanction that view.

Hare was one of the witnesses examined in the celebrated trial of *Burke* for murder.

LORD CHELMSFORD:—Yes, we all remember that.

The Lord Advocate:—There was a protection given there to *Hare*, who was admitted as king's evidence. Then he goes on:

However this may be, I am quite clear, according to the law and practice among us, that there is no foundation for any such proposition. The concourse of the Lord Advocate is, in the first instance, essential to the right of the private party to prosecute. On that point I think it unnecessary to say more. But the Lord Advocate has declined to concur. He says that he does not think it a case in which he should concur. Does that terminate the application, or is there any remedy? On this matter there is fortunately very little authority in practice. So rarely has the administration of the public prosecutor come into collision with the right of private prosecution, that very few questions have ever been raised in regard to it, and the concourse has been sparingly asked for, and much more rarely refused. I am of opinion that the presumption is that the discretion of the public prosecutor has been rightly exercised, and that, unless special grounds be shewn to the contrary, the absence of his concourse is fatal. But, on the other hand, I am far from saying that the Lord Advocate is supreme in this matter, or that he is entitled capriciously, or oppressively, or unreasonably, or inconsiderately, to restrain the private prosecution. I think this Court does possess power to give a remedy, should a case proper for their interposition be presented. But such a case must be shewn, and it might be sufficient for the present position of this case, that hitherto no such case has been presented by the complainer. Here, no cause whatever has been shewn to us to lead us to doubt that the Lord Advocate has exercised a sound discretion. His Lordship has explained that he found that the ground of prosecution was nearly twenty years old; and that certain

> intermediate proceedings had taken place, to which he referred, and which appeared to him to render the proposed prosecution oppressive. No answer has been made to this, and, *primâ facie*, I incline to think that his discretion was rightly exercised. In this position I am unwilling to say much on the mode, limits, and conditions under which an extraordinary remedy should be applied, the more so that the interposition now prayed for is of a kind in which, excepting in rare cases, it is in my opinion very inexpedient that we should embark. I shall content myself with saying that if such a case were presented as I have suggested my impression is that the Court has the power to permit the private prosecutor to proceed; and that, according to the circumstances, we have the power of doing so, either by requiring the Lord Advocate to concur, or by granting permission to prosecute without his concourse.

This would put the Scotch Court very much in the same position as that which the French Courts occupy; they would become both prosecutors and judges. But the propriety of these proceedings is probably not a matter for your Lordships' decision at present, because the application was refused, and that is sufficient possibly to raise the question sought to be raised by the Appellant; it certainly opens the question as to the competency of the present appeal.

Lord *Deas* (1) adopts very much the same view as the Lord Justice Clerk, except that perhaps he gives rather more weight to the power of the Court to control the Lord Advocate. He says:

> It involves a question of the highest importance to the administration of our criminal law, viz., whether, if Her Majesty's Advocate refuses either to prosecute or to give his concourse to a criminal prosecution, it follows that no prosecution whatever can take place. I do not think that view was contended for by Her Majesty's Advocate. Certainly it is not the law. The Lord Advocate has undoubtedly great power; but, if he were to refuse either to prosecute, or to give his concourse to a prosecution at the instance of the party aggrieved, in a case in which this Court thought it clear that there ought to be a prosecution, I am of opinion that we could either direct his Lordship to give his concourse, or authorize the private party to prosecute without the concourse. It is plain enough that by the common law and practice of this country, the party aggrieved was entitled to prosecute *ad vindicatam publicam*, as well as for pecuniary compensation.

I do not find any authority for the opinion, but the Lord Advocate seems to have thought that he was so well founded in his refusal to give his consent to the proceedings in the present case, that he did not think it necessary to rely upon the extreme right which he considered to be vested in him in right of his office.

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(1) 2 Coup. 251.

BIBL. LONDIN. UNIV.

My Lords, this application, directed against the Lord Advocate, having been refused by the Court, without its being necessary to inquire narrowly into the grounds in respect of which they refuse the application, the question is whether the present Appellant is entitled to appeal against that judgment of the Court of Justiciary, whose jurisdiction is confined to criminal matters alone. As your Lordships will have observed, when I read the application which he presented, the Appellant wanted the concourse of the Lord Advocate for the prosecution of Dr. *Graham Weir* for a crime alleged to have been committed by him, and not for any purpose connected with pecuniary compensation. The latter, of course, would have been quite open to him if he was not foreclosed by previous judgments. Unless prevented by something of that kind, he could have taken his civil remedy; but instead of that, nothing would do for him but to have Dr. *Graham Weir* placed in the box as a criminal, and brought before the Court and tried under the criminal law. Then the question comes to be, is it competent to appeal to your Lordships' House against a judgment of the Court of Justiciary, which takes cognisance solely of crimes?

LORD O'HAGAN :—Was the subject-matter of those proceedings to which you have just been referring identical with the subject-matter in the case now before us?

The Lord Advocate:—It arose out of the granting of a certificate—the granting of a certificate comes to the same thing.

LORD CHELMSFORD :—That goes to the consideration of the discretion, not to the right.

The Lord Advocate:—Yes, my Lord. The question of appeal from the Court of Justiciary is one which has been before your Lordships, and was decided in a very solemn way. Your Lordships have the opinion of Mr. *Hume* (1), who was the leading writer on criminal law in *Scotland*, and was also professor of the law of *Scotland* in the University of *Edinburgh*.

I think your Lordship has correctly quoted: "that your Petitioner contends that there is no right of appeal from the said

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(1) Hume on Criminal Law, vol. ii. pp. 504–508.

High Court of Justiciary to your Lordships' House, and that the said appeal is wholly incompetent." That was the point which was intended to be raised by the objection to the competency.

THE LORD CHANCELLOR:—It was the general question as to whether there could be an appeal from the Justiciary Court or not.

The Lord Advocate:—Yes.

LORD O'HAGAN:—Certainly, that is the question put. It says, "because it is incompetent to bring under the review of your Lordships' House any interlocutor, judgment, or sentence of the Court of Justiciary."

THE LORD CHANCELLOR:—The question must be whether this sentence of the Court of Justiciary can be competently brought here to be argued upon the merits.

The Lord Advocate:—Mr. *Hume* says (1):

> The sentences of the Court of Justiciary are not subject to revisal in any form of process, either before themselves or any other tribunal, not excepting even the House of Lords, to which the judgments of all the other Courts of Justice of both *Scotland* and *England* may be carried.
>
> This interesting question has more than once been the subject of discussion, and more especially it was so in the case of Lieutenant *Ogilvie*, who after his conviction and sentence, applied to His Majesty for a respite until he should have an opportunity (Parliament not being then assembled) of presenting a Petition of Appeal. On this occasion a respite was accordingly granted in the meantime, and a remit was made to the Attorney-General for *England* and the Lord Advocate for *Scotland* for their opinion as to the competency of such an appeal.

Sir *Archibald Alison*, the latest writer on the subject, says:

> No appeal is competent from the Court of Justiciary to the House of Lords, and it is only competent to obtain a remission of the sentence by pardon or remission from the Crown or reversal in the Legislature.
>
> It was at one time strenuously contended that an appeal to the House of Lords is competent against a sentence of the Court of Justiciary, but after a variety of unsuccessful attempts, it is now settled by a long *series rerum judicaturum*, that no such proceeding is competent (2).

Now, I may refer your Lordships to the leading case—the case of *Bywater* v. *The Crown* (3)—that is a very important case, and the date of it is the 1st of May, 1781.

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(1) 2 Hume, p. 504.

(2) Alison's Criminal Law of Scotland, p. 677.

(3) 2 Paton's Ap. 564.

H. L. (Sc.)
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Advocate.

It is especially the judgment of Lord *Mansfield* to which I would call your Lordships' attention. Lord *Mansfield* says:

> My Lords, this is a petition in the nature of an appeal from a sentence of the Court of Justiciary in *Scotland*, by which the Petitioner is adjudged to suffer death. The object now for your Lordships' consideration is whether this House has any jurisdiction on the subject. And, as the matter has passed since I had the honour to sit in this House several times, I have, as at present advised, formed an opinion that the appeal is not competent, and that this House has no jurisdiction in any appeal in a capital case. By the Articles of the Union, the Court of Session, and the Court of Justiciary, are, to all intents and purposes, with all rights, forms, customs, manners, privileges, &c., to remain just as they were before. At the time of the Union it was clear established law that there lay an appeal from the Court of Session to the Parliament of *Scotland*, and therefore that jurisdiction devolved upon this House, from the moment of the Union, down to this day, as your Lordships well know; and it has been very beneficial to that part of the kingdom. With regard to criminal cases, there never existed an idea of an appeal from the Court of Justiciary before the Union. There is not a single book that says there does lie one. The Bill of Rights, which claims a right of appealing in civil cases from the Court of Session, does not say a word of criminal cases, or of the Court of Justiciary; and agreeably to this, there has not existed an instance of an appeal to this House in a criminal and capital case, from the Court of Justiciary in *Scotland*, since the Union, and yet men have been hanged every day and they have made objections below, which objections below have not availed them.
>
> There never yet has existed an appeal here (I shall state to your Lordships by-and-bye the only case that is alleged to the contrary), and so it went on to the year 1766, and in that year a very extraordinary case for the atrocity of the crime and for the starting of this objection happened. A lady of family and birth was so far seduced, either by her own wicked inclinations, or by the brother of her husband, that they two, with an adulterous incest between them, ended it by the murder of the husband. Being persons of rank and fortune, they litigated their trial, and they had very able counsel to assist them. They were sentenced to death, a punishment which was not too severe for their crimes. She pleaded pregnancy. She was found to be pregnant; her sentence was respited till her delivery. It entered into no man's head that there lay an appeal to the House of Lords that would suspend the execution, so the brother was executed, not having thought that an appeal lay to your Lordships. By the time the lady was delivered, an experiment was suggested. It was during the recess of Parliament, and opinions (as they were called) were taken of counsel below, opinions were taken of counsel here. Indeed, I cannot call them opinions that were given; they were dissertations, and the dissertations concluded to try the experiment; and they saw no reason why an appeal should not lie in a criminal, as well as civil, case, and that it would be terrible if it did not, for the Court of Justiciary might try and execute men who had been guilty of no crime, and there would be no redress. The scheme was tried, but the Parliament not being then sitting, the execution would have proceeded, therefore they petitioned the king (not in council) to grant reprieve, to permit the party to bring an appeal to the House of Lords; and they lodged with the Secretary of State the opinions they had taken

that seemed to be of that side of the question. There was an opinion of a gentleman at the Bar here in *England*, who most certainly by his opinion never heard a word of the laws of *Scotland*, or had an idea of what they were. Upon this petition a reprieve was granted—it was temporary only. The then Lord Advocate (Sir *Thomas Miller*) was written to to give an opinion upon the appeal. There is from him upon this subject as able, clear, decisive, and learned an opinion as there is upon any one subject or point of real history or law, and it is impossible for any man who reads that report to doubt, for he says, "I have directed searches to be made into all the records of Parliament. I have directed searches into the records of the Court of Justiciary. I have looked into the records of council. I have looked into the law books—the law books (particularly Lord *Stair's*) say expressly there is no appeal in a criminal case. There is no book to be found that ever said there was. There is no instance of an appeal to the House of Lords since the Union. Besides, great inconveniences would arise, if there was liberty for every criminal to appeal from a sentence of condemnation." My Lords, upon full consideration of this report, and likewise upon what they call opinions on the other side, His Majesty took the opinions of all the Lords of the Cabinet Council. The question had been well considered, and they were unanimously of opinion, and the noble Lord who then sat upon the woolsack was one, I was another, who, upon full conviction (and I have never changed my opinion since, but have grown stronger and stronger in it), advised His Majesty that, as the crime could not call for mercy (it being of the most flagrant and atrocious nature), there was no right to appeal to the House of Lords; but if there had been, they certainly had no right to call upon the king to grant a reprieve. They could not stop the execution by an appeal. That argument affords a demonstration that the law did not give them a right to appeal. Where the execution can never be remedied, it is a stay of proceedings; they cannot proceed where a writ of error is allowed to execute the man in the meantime; but there is no way of staying the execution by a right to appeal to a jurisdiction that does not always sit; the man is hanged before that jurisdiction can hear of it, and therefore an application to the king for a reprieve in aid of the jurisdiction of the House of Lords showed there could not exist such a jurisdiction, and therefore the reprieve was suffered to expire. The lady made her escape. I do not know what became of her afterwards. In the year 1768, there was an application by a gentlemen at the Bar, who was prosecuted for bribery at an election. He was a member of Parliament, he pleaded, in stay of any proceeding, that it was a criminal prosecution before the Court of Justiciary, and he pleaded privilege of Parliament in stay of any further proceeding. The Court of Justiciary allowed him the privilege of Parliament, stopped further proceeding, and adjourned to a particular day. An appeal from this interlocutory Order was presented to this House; the House doubted of their jurisdiction, and referred it to a committee, to examine and report whether it was competent. Before that committee, which was extremely well attended, the whole matter was gone into with wonderful pains and diligence. It was fully argued, all the records had been searched, and I have here a volume of the copies of the records that were then recited—there were the records from the Parliament of *Scotland* from the Council—every instrument from whence any argument could be drawn, and, after hearing all the arguments, and considering of all those precedents, the Lords of the Committee, and the House afterwards, were clearly of opinion that the order made by the Court of Justiciary was wrong; but they were

> of opinion that they had not jurisdiction to receive the appeal, and a middle way was taken, to adjourn the consideration, whether the appeal was competent or might be received.
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> It was sent back with liberty to the parties, notwithstanding the appeal, at the day to which the cause was adjourned, to pray the Court to reconsider whether it was by the common or statute law of *Scotland* upon which they founded their right to take cognisance of the subject, because there was no common law, there was no statute law, which allowed a member of Parliament a privilege against a prosecution for crimes. If they went upon the usage of Parliament they had no right to take cognisance of that matter upon that ground, and if they went upon that they mistook it, for there is no usage of Parliament that says that a member of Parliament shall not be prosecuted for crimes. Therefore it was sent back, with that direction perfectly well understood at the time, and no more was heard of it; but all the precedents were fully discussed at that time, and the opinion they formed was very clear that they did not go to shew that there was any usage whatever of an appeal before the Union in criminal cases.

Then his Lordship refers to the cases I have mentioned of *Mungo Campbell* and *Murdison* and *Miller*, in which attempts were made to appeal against judgments of the Court of Justiciary, but this House decided they were incompetent, and that the House had no jurisdiction.

There is the case in which the magistrates of *Elgin* were concerned. Your Lordships will find that Lord *Mansfield* deals with that case also (1), observing that,

> In the year 1713 (I lay an emphasis upon the time) the magistrates of *Elgin* chose to encourage the Episcopalian persuasion, and they gave to an Episcopalian minister a little chapel, which they said was their property. When they had given this to him, and delivered the key, and he officiated, it was taken up by the procurator of the Kirk, and it was brought up by the then Lord Advocate (if I do not mistake) as the subject matter of a criminal prosecution before the Court of Justiciary. A criminal prosecution! Why? Because the magistrates, thinking the building and the ground to be their own, had given it to a minister that was tolerated according to law to perform Divine service there. What was the charge? The charge was a civil question, that the chapel did not belong to the magistrates, but to the Kirk, that they had taken the property of the Kirk and given it to a toleration minister; and the only question was, Did it belong to the kirk or the magistrates? and was the Petitioner to be restored to the enjoyment of it? When it came before the Court of Justiciary they were startled a little at proceeding upon this, and they said it was a civil question, and they remitted it to the Court of Session, to try whether the matter in dispute belonged to the magistrates or the Kirk? The Court of Session tried and determined that it belonged to the Kirk. This civil question is carried before the Court of Justiciary, and the Court of Justiciary, upon the foundation of the sentence of the Court of Session, ordered

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(1) 2 Paton, 569.

the key to be delivered to the Procurator for the Kirk, and, besides *that*, they imposed a fine. The magistrates appealed to the House of Lords from the sentence of the Court of Session; and that I might be correct I looked at the petition before I began to trouble your Lordships. The petition is this, "An appeal from the sentence of the Court of Session and the proceedings of the Court of Justiciary founded thereupon." The order of the House of Lords is reversing the sentence of the Court of Session, and annulling what was done founded thereupon, that is, the delivery of the key and the fine. There are no printed cases to be found in this cause, if they did print cases. There is no objection made in the answer here to the jurisdiction of this House, and indeed they could not. The foundation is the civil sentence of the Court of Session, and all that is built upon that must fall to the ground when the House of Lords had reversed the sentence of the Court of Session for them; there never was such a sentence. There has been no attempt in a criminal case or any application to this House till 1768, when, as I stated, there was a very similar case occurred to me to shew it in a stronger light. By the peculiarity of the law of *Scotland* the Court of Session can judge of one crime, and that is forgery; they examine by depositions, and if they find a man guilty, they remit him to the Court of Justiciary to inflict the penalty of death or a lesser punishment, and it goes upon their sentence to the Court of Justiciary. I do not take upon me to say whether the Court of Justiciary may acquit, but within this twelve months it has been determined that the Court of Justiciary can go into no evidence but what comes from the Court of Session. Suppose a man found guilty by the Court of Session, he appeals to the House of Lords and the House of Lords reverses the decree of the Session, is it possible the Court of Justiciary can go on with the cause? It is impossible.

Then his Lordship goes on to deal with another case (*Campbell of Barrisdale*), and I may mention that it appears in a note to the report (in *Bywater's Case*) that this question was raised in the House of Commons by a motion founded upon the assumption that there was no appeal competent against a judgment of the Court of Justiciary in criminal cases; and Mr. *Adam*, who was afterwards Lord Commissioner in *Scotland*,

Moved for a committee of the House of Commons, with instructions to consider the propriety of bringing in a bill to alter the law of *Scotland* in this respect, and assimilate it to the appeal in *England* by writ of error. The recent cases above mentioned, and particularly those of *Muir* and *Palmer*, entered deeply into the discussion; but in a House partly composed of *Fox*, *Sheridan*, *Wyndham*, *Wilberforce*, *Whitbread*, *Burke*, and Sir *Philip Francis*, it was lost.

Therefore there can be no doubt that in that case of *Bywater* the opinion of your Lordships' House was expressed clearly and distinctly, and that an appeal from the Justiciary Court was not competent, and the practice has been so understood and assumed in discussions in the Legislature, and also by all the writers upon criminal law. The only authority founded upon by the Appellant, I think, is Mr. *Erskine's* statement.

Mr. *Hemming*:—And Lord *Kames*.

The Lord Advocate:—I will come to that. Mr. *Erskine* says (1):

> The Justiciar of *Scotland* had in ancient times a supreme jurisdiction not only in criminal but in civil matters, even in questions of heritage—Reg. Maj., lib. 1, chap. 5, sects. 3, 4, 5; lib. 2, chap. 16, sect. 37. That he retained his civil jurisdiction till 1487 appears by Act 105 of that year, in which he is placed at the head of the Judges ordinary. . . . After the institution of the College of Justice the Justiciar never judged in civil matters. He still continued, however, to be the supreme criminal Judge, and in that capacity not only determined the punishment to be inflicted on the criminal, but condemned him in the damage claimed by the party injured, in which last he had a cumulative jurisdiction with the Court of Session. The question whether the jurisdiction of the Court of Justiciary is supreme in the highest sense so as to exclude a review, even by the House of Peers, is of considerable importance, and the solution is not without difficulty. Those who maintain the affirmative appeal to our more ancient laws. St. Alex. II., chap. 2, sect. 6; Balf. 573, chap. 37; Skene, Treat. of Judges in Crim. Causes, tit. 14, sect. 7. They also allege that the same doctrine is agreeable to the Claim of Right, anno 1689, which, though it authorizes the applying to Parliament against the iniquitous sentences of the Court of Session, carries not the least insinuation that the same remedy is competent against those of the Justiciary; and they add that as by Art. 19 of the Treaty of Union the Court of Justiciary is to continue as it was then constituted, there can be no appeal to the British Parliament from the sentences of our Supreme Criminal Court since there was none to the Scottish Parliament. If this question were confined to the verdict of juries upon criminal trials, it could hardly admit of a doubt. These verdicts are not the proper subjects of appeal, as their truth or conformity to the evidence cannot be properly judged by those who were not present when the evidence was taken. But if the question includes also the proceedings of the Judges or Court upon any point of relevancy, inability of witnesses, degree of punishment to be inflicted on the pannel, &c., that may be liable to exception, the opinion that the sentences of the Justiciary are reviewable by the British House of Lords is the most probable, for that House, as the Sovereign Court of Appeals, seems to have an inherent right of reviewing the sentences of all other Judges, except in so far as they may have been limited by an order of their own, which has never been done; and, in fact, an appeal was entered and tried in that august House against a Justiciary sentence anno 1713.

Lord *Kames* says (2):

> The House of Lords is undoubtedly a Court of Appeal with respect to the three sovereign courts of this country. There are appeals daily from the Court

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(1) Erskine's Institute of Scotch Law, b. i. t. 3, p. 24.

(2) 2 Paton's Appeals, 564.

of Session. Appeals from the Court of Justiciary have hitherto been rare, and probably will never become frequent. The proceedings of this Court being brought under precise rules, afford little matter for an appeal, which at the same time would be but a partial remedy, as the verdict of a jury can never be called in question. An appeal, however, from this Court is competent, as well as from the Session, of which there is one noted instance.

The case to which Lord *Kames* refers is that of the magistrates of *Elgin*, commented upon by Lord *Mansfield*, as already stated. With the exception of these authorities, I do not find that any reference has been made on the other side in support of the competency of the present appeal; and I venture to submit that, having regard to the *Bywater Case* (1), your Lordships are now in a position to uphold our objection to the competency of Mr. *Mackintosh's* appeal.

Mr. *Hemming*, Q.C.:—

My Lords, I think the Lord Advocate agrees with me, that the question to which he has mainly directed his attention is simply whether there is an appeal from the Justiciary Court to your Lordships' House, and not whether the Justiciary Court has a right of controlling the exercise of the Lord Advocate's discretion.

The Lord Advocate has relied upon what passed in the *Bywater Case* (1), upon the general understanding which he says has since prevailed, that there is no appeal from the Court of Justiciary, and upon certain passages which he read from the treatises of *Hume* and *Erskine* and Lord *Kames*. But it is not unimportant to advert to a matter which the Lord Advocate has wholly passed over, and that is that until the *Bywater Case* (1) the views which were there suggested as to appeals had never occurred to any one from the date of the Union to that time, that is to say, for more than fifty years; at all events, they had never been mentioned in your Lordships' House until that time.

In his observations on the *Bywater Case* (1) Lord *Mansfield* was very careful to say that he did not ask the House to reverse or depart from anything which it had done in previous cases; and when those previous cases are examined, I think it will be found that although they did not establish in any way the jurisdiction of the House to entertain an appeal in cases that were capital, or even in cases which involved punishment for "grave misdemeanour," namely, seditious libel, still they do shew that the House would entertain an appeal from a decision of the Justiciary Court, provided that it was of such a character as to render it proper that such an appeal should be entertained.

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(1) 2 Paton's Appeals, 564.

In very early times the Court of Justiciary did exercise a civil jurisdiction in matters connected with crimes. There is no rule that the Court of Justiciary is exempted from appeals to this House, although in certain classes of cases such appeals are excluded.

The question really turns not so much upon the ancient practice of the Court of Justiciary in *Scotland* as upon the true construction of the Treaty of Union. The whole theory of the argument which is used against the exercise of this jurisdiction by your Lordships' House is a theory that your Lordships have no jurisdiction to entertain appeals from a Scotch Court unless the Parliament of *Scotland* had a similar jurisdiction before the Union. For that argument I confess I can see no ground in reason.

Now my Lords, so far as I can discover, that argument was never suggested and never thought of for fifty or sixty years after the passing of the Treaty of Union, and if your Lordships look at the position of the two countries at the time the Treaty was entered into, if you read the Treaty by the light of those circumstances, and then consider the way in which that Treaty was interpreted by the House of Lords, and by all the authorities for at least half a century, I think your Lordships cannot fail to come to the conclusion that the meaning of that Treaty was that the whole political and judicial constitution of *Scotland* was swept away, and that the political and judicial constitution of *England* was substituted for it in every particular not mentioned in the Treaty itself. If that is so, and there is very much in the proceedings that took place at various times in your Lordships' House to shew that that is the construction that ought to be put on the Treaty of Union, it follows that to your Lordships' House, as the ultimate Court of last resort in all cases, belongs the same jurisdiction over every Court in *Scotland* which it exercised prior to the Union over every Court in *England*. The House of Lords in *England*, at the time of the Union, acted as the *magnum concilium* of the sovereign. It was the Court of ultimate resort to which appeals lay from every English tribunal which had no other Court above it. Ultimately the appeal went to the sovereign in the House of Lords from every Court in *England*. Then, if I am right in saying that the Treaty of Union subjected *Scotland* to the same rules, both in political and judicial matters, to which *England* had previously been subjected, it will follow that by the constitution of *England*, which had become the constitution of *Great Britain*, an appeal lay from every Court, not excepting the Court of Justiciary, in matters of law to your Lordships' House.

The fact was undoubtedly that appeals from any kind of Court had become very rare in the later periods of Scottish history prior to the Union. There were various causes that led to that,—the confusion in which the country was plunged during a great part of the time had much to do with it; the large exercise by the Court of Session of something equivalent to an appellate jurisdiction had also much to do with it, and there were various other circumstances tending to produce the same effect.

I will read to your Lordships the 19th Article of the Treaty of Union:

> That the Court of Session or College of Justice do after the Union, and notwithstanding thereof, remain in all time coming within *Scotland* as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union; and that the Court of Justiciary do also, after the Union, and notwithstanding thereof, remain in all time coming within *Scotland* as it is now constituted by the laws of that kingdom, and with the same authority and privileges as before the Union, subject, nevertheless, to such regulations as shall be made by the Parliament of *Great Britain*, and without prejudice of other rights of justiciary.

It was understood on all hands that the Scottish Constitution was to be merged in the English, and that in that way, and in that way only, the United Kingdom of *Great Britain* was really to be represented by one and the same Parliament, and the people were to have the communication of all other rights, privileges, and advantages belonging to the subjects of either kingdom (1).

(1) "At the Union in 1707 each country retained its own laws, with this exception: that the Scotch law of treason was abolished, and the English law of treason substituted in lieu of it, on the principle that 'rules of public right should be the same throughout the *United Kingdom*.' The blessings

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The view taken by your Lordships in the early days after the Union, appears from the various records which you have of the proceedings in this House. The first case was that of *Roseberie*. I am reading from journals and from the particulars which are collected in Mr. *Macqueen's* book on the Appellate Jurisdiction of the House of Lords, at page 286. What he says is this: "The first appeal presented to the House of Lords from *Scotland* was that of the *Earl of Roseberie* v. *Sir John Inglis*, concerning which there are the following minutes in the Journals. "*Earl of Roseberie* v. *Sir John Inglis,* 18 February, 1707. Upon reading the petition and appeal of *Archibald*, Earl of *Roseberie*"—so that the first step was a petition and appeal, which was the same step that was taken on the case of an appeal from the Court of Chancery here—"from a sentence or decree, made before the Lords of Council and Session in that part of *Great Britain* called *Scotland*, on the 1st of February, 1695, and praying a reversal of the said sentence or decree, and such other order and decree made for the Petitioner's relief as should be just; it was ordered, That the said Sir *John Inglis* might have a copy of the said appeal, and he was required to put in his answer thereunto in writing on

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of the English Constitution, however, were not extended to *Scotland*. The Scotch consequently have no Magna Charta, no Bill of Rights, no Habeas Corpus. They have, indeed, the Act of 1701; but that Act is denounced as 'a mass of imperfect protection and practical confusion.' Lord *Cockburn*, the distinguished Scotch judge, was indignant on this point. In his pleasant memoirs he asserts that there is no security for liberty on the north side of the *Tweed*. Personal freedom depends on the temper of the existing government, or rather on the discretion—peradventure the caprice—of the Lord Advocate. When that high functionary incarcerated a gentleman supposed to entertain dangerous political opinions, the Lord Advocate justified himself in the House of Commons by the proud boast that he represented the Scottish Privy Council, and that his powers were unlimited. Under the sway of a benignant sovereign Caledonian grievances have practically disappeared. But the grave question remains whether it is consistent with the dignity of an intellectual people that their political rights should depend on the clemency of the government. To digest the law of *England* alone, without any reference to *Scotland*, would be a pretty sure way to widen the existing segregation; but to digest the two systems harmoniously together, would be to realise quickly that amalgamation which was desiderated by *Bacon* at the union of the Crowns, and desiderated by *Somers* at the union of the kingdoms." (From a paper by *J. F. Macqueen*, Q.C., read at the *Manchester* Congress of Social Science on the 8th of October, 1866. Lord *Brougham* presiding.)

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Monday, 15th March next, at eleven o'clock in the forenoon;" so that you have jurisdiction assumed at once on an ordinary petition and appeal, which was not at all in itself in the form of a protestation for remeid of law. Whether it was accompanied by that or not, I do not think appears; at all events, there was the petition and appeal in the English form. Then on the 16th of March, 1707, there were further proceedings taken, and an order was made for delivery of records to the Earl—copies of depositions and matters of that kind. Then the appeal proceeded, and a day was appointed to consider it. Finally, on the 27th of March, 1708, "The Earl of *Rochester* reported that it was the opinion of the Committee that the Respondents in this and all other cases of appeal from *Scotland* do put in their answers as Respondents do in cases of appeals from the Courts in *England*, within the time appointed by the House, and that the clerk register and his deputies, the principal clerks of Session, shall give authentic copies," and so on. Therefore, you have this in the very first case—the English practice is adopted whatever that may amount to. Then the next step taken by the House of Lords of importance was this. An Order was made on the 19th of April, 1709:

> It is ordered by the Lords Spiritual and Temporal in Parliament assembled, That after an appeal shall be received by this House from any sentence or decree pronounced in any Court in *Scotland* (clearly contemplating two Courts or probably more), and an order made by this House for the Respondent to answer the said appeal, and notice of such order duly served on the Respondent, the sentence or decree so appealed against from such time ought not to be carried into execution by any process whatsoever.

The first case was the appeal of Colonel *Munro*, which is not reported. It occurred in 1724. The House of Lords does not seem then, however, to have had any doubt of its power of review. The Appellants were Colonel *Robert Munro*, of *Fowls, John Forbes*, of *Culloden*, and several others, and the Lord Advocate of the day was among the Respondents. The Court must have received the petition, for it ordered the Respondents to answer it (House of Lords' Journals, vol. xxii.). Of the further history of this appeal no trace is to be found. But on the question of jurisdiction, the order to answer the petition is so far conclusive, unless the question was reserved (1).

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(1) Robertson's Appeals, 65.

I think if your Lordships look into these cases, one explanation, and it may be the better explanation, of what occurred is, that the idea of questioning the competency of the appeal had not occurred to any one at that time. You cannot find a trace of the competency of the appeal being questioned until fifty or sixty years after the Union.

Then, my Lords, there was another case which seems to go somewhat further—the case of *Geddie and Mackintosh* v. *Dempster* in 1767 (1). Therefore, we are now approaching the time when this question of competency was first raised. *Geddie* and *Mackintosh*, with the concurrence of the Lord Advocate, brought a prosecution for bribery against Mr. *Dempster*, M.P. for the *Fife Burghs*. Mr. *Dempster* pleaded privilege of Parliament which plea was, on the 7th of December, 1767, sustained by the Court of Justiciary to the effect of adjourning the trial until the time of privilege should cease. Against this interlocutor the prosecutor entered an appeal to your Lordships' House. On the 20th of January, 1768, the Respondent was ordered to answer within four weeks, and the matter of the competency of the appeal having been remitted to a committee, *Mackintosh* appeared and argued in support of the competency of the appeal. The committee having reported, the following judgment was given on the 7th of March, 1768:

> That the Petitioners be directed by themselves or agents to attend the Court of Justiciary on Monday next, being the day on which the Diet is continued by their second interlocutor, bearing date the 7th of December last, and in case the declaration in their first interlocutor, bearing date the same day, should be pleaded as a bar to the due course of justice, that then the Petitioners do apply to the said Court to reconsider whether they were authorized by the common or statute law of the land to take cognizance of the subject-matter and to make such declaration. And it is also ordered that the said Court be at liberty to proceed, notwithstanding the said appeal.

That is scarcely the order which the House of Lords could have been expected to make if an appeal of that kind was considered not to be competent.

The case of *Geddie and Mackintosh* v. *Dempster* shews that up to the year 1767 there had been no authority at all adverse to the competency of your Lordships' House in matters of this kind, and then for the first time the shadow of a doubt arose as to the subject. That was sixty years after the passing of the Treaty of Union; and during the whole of the intervening period the House of Lords had been steadily exercising its jurisdiction in Scotch cases, without shewing the slightest indication of a doubt of its power to exercise jurisdiction over every case that could come before it.

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(1) Maclaurin, 382, 467; Journals of the House, vol. xxxii. 132.

In some of the early cases appeals were brought to the House of Lords, not only from the decisions of the Court of Session sitting as Commissioners of Teinds, but also from the earlier Commissioners of Teinds who had exercised their power under previous statutes; and the House of Lords exercised a jurisdiction, entertained those appeals, and reversed, not only decisions of the Court of Session sitting as Commissioners of Teinds, but the previous decisions of the earlier Commissioners of Teinds. It is difficult to see upon what principle that could have been done, except upon the assumption that where there was no other appeal provided, an appeal must necessarily lie to the House of Lords. One of those cases is *Durham* v. *Lundine* (1). There the Appellant was the patron of the parish of *Largo*, and in 1698 the then minister of that parish, during the minority of the Appellant, obtained a decree of the "Commissioners for Plantation of Kirks and Valuation of Teinds." But there was no appeal in *Scotland* before the Union from the Commissioners of Teinds to the Court of Session. Here there are two decrees made by two sets of Commissioners, one in 1698, and another, to the same effect in affirmance in that sense), in 1708, and the House of Lords reverses both. It is very difficult to see where that jurisdiction came from, unless the House had jurisdiction quite irrespective of that which the Parliament of *Scotland* had been in the habit of exercising.

I think there was no instance in which the Court of Session exercised any jurisdiction by way of reduction over the Commissioners of Teinds before the Union. I searched, and failed to find a case of that kind, but that does not prove the negative, of course.

If I am right in that, then you have this old decree of 1698, which could not have been reviewed and reversed before—reviewed and reversed by your Lordships' House.

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(1) Robertson's Rep. 16.

There is another similar case, my Lords, also reported in *Robertson* (1), which occurred a few years later. It is the case of *Lord Kilsyth* v. *The Presbytery of Stirling.* In that case there were various proceedings taken before the Commissioners of Teinds, and it supports the view I venture to suggest to your Lordships, namely, that there was no jurisdiction in the Court of Session before the Union, and that what jurisdiction they did acquire in these teind cases was by becoming Commissioners of Teinds.

In the case of *Durham* v. *Lundine* (2), you have, in the first place, a decree of the Court of Teinds made before the Union, and then after the Union you have cross applications to the Court of Session to review the matters—in a certain form to reverse, or give effect to the former decree; you have nothing done by the Court of Session. There is then an appeal to this House, and in each case upon that appeal the original decree is reversed. I use those two cases in this way; they seem to rest upon a jurisdiction, on the part of the House of Lords, wholly independent of anything which the Parliament of *Scotland* had before the Union. And, my Lords, it is not quite immaterial perhaps to consider the general character of the cases that occurred in the first few years after the Union. Among the cases in the first twenty years, reported by *Robertson*, there are five from the Court of Session and two from the Court of Teinds. There is the single case of *Elgin* (3), which is a mixed case; and then there is a curious case of *Greenshields* v. *The Provost of Edinburgh* (4). That is a little remarkable, because an objection to jurisdiction was raised, shewing that at all events the matter was pretty keenly contested, and no objection at all was taken to the jurisdiction except upon grounds which would have been equally applicable to an English case.

THE LORD CHANCELLOR :—What case are you referring to?

Mr. *Hemming*, Q.C.:—The case of *Greenshields* (4); that also was in 1710, where the Presbytery had interfered with the exercise by an Episcopal clergyman of certain rights which he claimed. The Presbytery "recommended it to the magistrates of *Edinburgh* to

(1) Page 65.

(2) Robertson's Rep. 16.

(3) Robertson, 69.

(4) Robertson's Rep. 12.

render this prohibition more effectual." In fact, they handed him over to the civil power. In consequence of this recommendation, the magistrates passed a sentence upon him—a criminal sentence in effect—and ordered him ultimately, as he was contumacious in their view, to remain in gaol "until he should give security to desist from the exercise of the ministry within their bounds, or to remove himself from thence." That was the decision of the magistrates, and then there were Bills of Suspension. *Greenshields*, being committed to prison, presented a Bill of Suspension to the Court of Session, to which the Respondents put in answers, insisting that "the suspender having received ordination from the Bishop of *Ross* after the abolition of episcopacy in *Scotland*, and the said bishops being exauctorated, the suspender was not a minister duly qualified." In respect of these answers, the Court refused the bill. Then the Appellant presented a second bill of suspension, and that also was refused, and the Appellant remained in prison seven months. The appeal was brought "from the sentence of the magistrates of *Edinburgh* and a decree of the Lords of Session, the first the 15th of September, and the last the 28th of December, 1709." An appeal from the sentence of the magistrates of *Edinburgh* was not such a matter as the Parliament of *Scotland* was in the habit of entertaining before the Union, and it would seem, from this case, that the House of Lords, having ultimately assumed jurisdiction in the matter, heard the argument, both upon a preliminary objection and on the merits, and they finally "ordered and adjudged that the sentence of the magistrates of *Edinburgh* and the decree of the Lords of Session in *North Britain*, made against the said *James Greenshields*, be reversed." That again, is an exercise of a jurisdiction different from anything which the Parliament of *Scotland* was in the habit of exercising before the Union.

Now, my Lords, it is very singular that with all this variety of cases occurring shortly after the Union, there is not a trace of the idea being started that the House of Lords was not competent to entertain appeals from every Court in *Scotland*, upon the same footing as it entertains appeals from, or reviews the proceedings of, any Court in *England*.

It may be said, no doubt, and it is a very weighty observation, that reasoning was used in the *Bywater Case* (1) which to some extent pointed to the idea that the whole jurisdiction of your Lordships' House was limited by the jurisdiction which the Parliament of *Scotland* could exercise. If that be taken in its largest sense, I think the cases I have referred to shew, at all events, that this House has exercised a jurisdiction beyond anything which the Parliament of *Scotland* could have exercised, and, in fact, that in making appeals suspensory, it has done that which the Parliament of *Scotland* was by Act of Parliament forbidden to do in its judicial capacity. Now, my Lords, I say, putting those cases together, and coupling them with the fact that the opposite view was not started for more than fifty or sixty years afterwards, coupling that again with the orders that were made from time to time by the House of Lords, with respect to appeals from any Court in *Scotland*, the reasonable inference I submit is, that the House of Lords from the first, and for half a century afterwards, considered that the Treaty of Union gave it a general jurisdiction to review the decisions of every Court in *Scotland* as well as in *England*, which decisions were not reviewable by any intermediate Court.

On these grounds, I ask your Lordships to hold that the decisions of the Court of Justiciary are as much subject to review as those of any other Court, except to the extent to which for special reasons your Lordships have thought fit not to entertain appeals on criminal sentences, that is to say, sentences passed on persons found guilty of serious offences, as to which I should not ask your Lordships to depart from any rule that has been so long acted upon. But, treating those cases as exceptional, I do ask your Lordships to say that there is no ground for doubting the power of this House to entertain appeals from the Court of Justiciary, merely because it is the Court of Justiciary. There may be grounds for saying that an appeal from a capital sentence or an appeal from a sentence of seditious libel is one which this House, in its discretion, does not think fit to entertain (2). But it does

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(1) 2 Paton's Appeals, 564.

(2) In English and Irish criminal cases the resort to the House of Lords is not by appeal, but by writ of error issuing from the Crown. The discretion is regal; the Attorney-General granting the fiat. Chitty on Criminal Law, p. 366; see also Russell on Crimes, edited by Mr. Greaves, Q.C. Formerly writs of error lay from the Court of Exchequer in *Scotland* to the House of Lords by the Lord Advocate's fiat: Macqueen's House of Lords, pp. 362, 379; and his Reports, vol. i. p. 79, case in 1852.

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not follow from that, although the idea may have slipped into some of the text books, and though the idea may even have received some countenance from the highest possible authority, that of Lord *Mansfield*, that the House will not entertain any appeal at all in criminal cases. The orders of the House do not go beyond this, that appeals will not be received in those cases from those particular criminal sentences. They do not say, and Lord *Mansfield* was very careful to guard himself from saying, that in no case would an appeal be entertained from the Court of Justiciary. It is not that the Court of Justiciary is free from appeal, but it is that sentences of that particular kind are sentences which this House does not think fit to review. My Lords, if that distinction is adopted, it will be a matter for your discretion, and that of your Lordships' House, whether an appeal in a case like that under consideration is one which ought to be accepted or rejected,—that, as I have said, is a question wholly independent of the merits of the case. I may assume that the decision of the Justiciary Court had been the reverse of what it is, and then the question would have arisen in precisely the same form as to whether the Lord Advocate would have had a right to appeal against that decision of the Court of Justiciary, taking away from him one of his most cherished privileges. Supposing that had been the case, if an appeal from the Justiciary Court is one which it is incompetent to us to present, it follows that it would have been equally incompetent, if the decision had gone the other way, for the Lord Advocate to present an appeal. And if the matter rests, as I submit it does, not upon any limitation of the jurisdiction of this House, but upon the discretion of this House, I should submit to your Lordships that in cases of that character, where the question to be decided is, not whether a man has or has not been guilty of a particular offence, not whether he has been properly tried or not for that offence, as to which it may be that the Court of Justiciary might be properly trusted, but where the question is, whether the Lord Advocate has or has not an absolute right to prevent any prosecution in *Scotland*, except with his concourse, when that question arises, if it is a matter of discretion, I submit that your Lordships would consider that it is one of those serious constitutional questions which are proper to be brought under review by this House.

I do not think that my learned friend the Lord Advocate would have suggested that the subject-matter in this case is one which is unfit for appeal. The only ground upon which he can uphold his case is this, that it has been decided with regard to a large class of sentences pronounced by the Justiciary Court, that no appeal will be entertained by this House. Founding himself upon that he asks you to generalise further than this House has ever done, and to say that in no case will appeals be entertained from that Court at all. It is true that the circumstances were very special in the *Elgin Case,* and in others in which the appeal was taken up and dealt with to a certain extent; still it is enough to shew that there is no disability on the part of this House to entertain appeals from the Court of Justiciary *quâ* Court of Justiciary; and that being so, the fact that this appeal comes from the Court of Justiciary is not a reason why it should not be heard. Does the fact of it being a criminal case make any difference? Now, it is important to bear in mind that up to the very moment of the Union, the Court of Session had the power to grant these criminal letters, and we might have applied to the Court of Session at that time, as well as to the Court of Justiciary.

We have this statement by Sir *George Mackenzie,* who was himself a Lord of Session:—The "Lords of Session have regularly no no jurisdiction in criminals, and yet they pass the bills whereupon all criminal summonses are raised" (1).

I submit that the theory which has been relied upon to exclude Mr. *Macintosh* is one which will not bear examination, namely, the theory that your Lordships' jurisdiction is limited by that which was previously exercised by the Scottish Parliament, because I have pointed to various cases in which a jurisdiction has been exercised, both in reviewing causes and issuing orders, which could not possibly have been exercised by the Parliament of *Scotland.* If that be so it follows that there must be some other foundation for the jurisdiction of your Lordships' House, and that it must be measured by other considerations. It is difficult to find any other considerations, except this which I suggest, as a reasonable interpretation of the Treaty of Union, that your Lordships have the

(1) Sir George Mackenzie's Institutions, p. 387.

same right of dealing with decisions of the Courts in *Scotland* that you had previously exercised in dealing with decisions from the Courts in *England*, and that the limit placed upon that jurisdiction in the *Bywater* and another case was a limit of discretion. This is a case in which you would not, by the exercise of your discretion, limit the jurisdiction in the same way, as being a case in which a really great constitutional question is involved, as to the exercise of a power supposed to be vested in the Lord Advocate.

At the close of Mr. *Hemming's* argument the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (1):—

My Lords, this question of the competency of the appeal has been argued with great care and diligence at your Lordships' Bar, and everything that could be said on behalf of the Appellant has been advanced by his learned counsel Mr. *Hemming;* but I think your Lordships will have no hesitation in holding that this appeal is not competent.

The appeal is brought under these circumstances. In 1872 the Appellant Mr. *Mackintosh*, applied to the then Lord Advocate (2) for what is termed his concourse, or his assent, to a bill which Mr. *Mackintosh* was in the course of presenting to the Court of Justiciary, for criminal letters against one Dr. *Thomas Graham Weir*, a physician in *Edinburgh*, "charging Dr. *Weir* with having in 1852" (twenty-four years ago) "entered into a conspiracy for the purpose of obtaining the detention of Mr. *Mackintosh* as a lunatic in *Saughton Hall Asylum*, near *Edinburgh*, well knowing that the petitioner was not insane." The Lord Advocate, the public prosecutor of *Scotland*, not thinking fit himself to prosecute, in the exercise of his discretion refused his concurrence; and thereupon Mr. *Mackintosh* called the Lord Advocate before the Court of Justiciary, for the purpose of obtaining an order obliging him to give his concurrence. The Court of Justiciary upon the first occasion, and upon a second when the same application was repeated, pronounced two interlocutors refusing the application, that is to say, declining to force the Lord Advocate to give his concurrence.

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(1) Lord *Cairns*.

(2) Now Lord *Young*.

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An appeal is brought to your Lordships' House. It is an appeal of a very special kind, for it is an appeal against the Lord Advocate. The Appellant is Mr. *Mackintosh*. The Respondent is not any person with whom Mr. *Mackintosh* wishes to litigate any question, but is the Lord Advocate. It is not, therefore, an appeal in the sense of an appeal between ordinary litigants: it is an appeal against one who is himself a public officer, raising the question of the exercise of his discretion.

The Lord Advocate presented a petition to your Lordships' House praying that the appeal might be refused as incompetent. That petition in the ordinary course was referred to the Appeal Committee, and the Appeal Committee desired that the question of competency should be argued at your Lordships' Bar before the case went further; and it has been argued here on that point accordingly.

The broad question is, whether an appeal lies to this House from an order, or sentence, of the Court of Justiciary, the Criminal Court in *Scotland*. But I am anxious at the outset to guard myself from being misunderstood upon this subject, and I wish to say that, so far as my opinion is concerned, even if an appeal lay from the Court of Justiciary to this House, still I should be of opinion that, having regard to the nature of the application raised in this particular case, it is one in which no appeal would lie. I only wish to say that at the outset, and not to base any decision upon it, because it was said on the part of the Appellant that that was not a question which he came here to-day prepared to argue. I only therefore make the observation as I pass, lest it should be supposed that that question had escaped your Lordships' attention.

But, now, my Lords, I come to the larger question, the question which has been argued,—how far an appeal lies, or whether it lies at all, from the Court of Justiciary. The answer to that question appears to me to lie in a very narrow compass. Your Lordships have asked for all the information which could be given as to what the precedents were before the Act of Union with *Scotland* for any appeal from the Court of Justiciary; and going back as far as any precedent can usefully be searched for, and considering everything that has been adduced, I think your Lordships will agree with me in saying that there has been no precedent whatever adduced of any appeal maintained before the Union from the Court of Justiciary to the Parliament of *Scotland.* It may be quite true that during the whole of that time it was not the habit to have appeals from other Courts to the Parliament of *Scotland.* But certainly even during the time when appeals, or what were called Protestations for Remeid of Law, which in substance were quite the same as appeals, were brought to the Parliament of *Scotland* from the other Scotch tribunals,—in those times there is no instance of any appeal from the Court of Justiciary. Looking to the state of *Scotland* at that time, and to the occupation of the Court of Justiciary, if it had occurred to any person that an appeal would lie, the chance of an appeal would certainly have been taken.

My Lords, the Act of Union provides, by the 19th article, with regard to the Court of Justiciary and the other Courts upon what footing they shall stand. It provides, first, that the Court of Session, or College of Justice, do after the Union remain "in all time coming within *Scotland,* as it is now constituted by the law of that kingdom, and with the same authority and privileges as before the Union." Now, my Lords, if before the Union the Court of Session stood as a tribunal subject to protests for remeid of law, which led to the review of its decisions by the Parliament of *Scotland;* and that that was its position the proceedings which took place between the Scotch estates and King *William* III. abundantly establish; and if at the same time the Court of Justiciary stood as the criminal tribunal from which there was no appeal to Parliament or elsewhere, then I apprehend that the 19th article of the Act of Union, continuing both these Courts with the same powers and authority which they had before, would naturally be taken to be a statute continuing the Court of Session with its decisions subject to review, and continuing the Court of Justiciary with its decisions as final and conclusive.

How, then, does it stand, my Lords, as a matter of precedent since the Union? Your Lordships have now the experience of upwards of 170 years since the Union. Is there any instance produced of any appeal from an order of the Court of Justiciary during that time? No instance has been found, notwithstanding the diligence used by the learned counsel for the Appellant. On the contrary, your Lordships have a most exhaustive and conclusive argument, delivered in this House by Lord *Mansfield*, in *Bywater's Case* (1), upon this very point. Lord *Mansfield* went through every case that was supposed to bear upon the question up to the time at which he spoke; and he shewed that there was no case of an appeal from an order of the Court of Justiciary, and that the one or two cases—the case of *Geddie* v. *Dempster* (2) and the earlier case of *Elgin* (3)—which were supposed to bear an appearance of an appeal of that kind, really were no authorities whatever for holding that such an appeal would lie. With regard to one of those cases, the case of *Dempster*, it appears to me to afford the strongest possible argument that an appeal would not lie; for that was a case in which if this House could have exercised an appellate jurisdiction, it was obviously well inclined to do so. But it found that it could not do so, and it, therefore, resorted to a very singular proceeding, which Lord *Mansfield* describes, and which was quite inconsistent with any assertion of an appellate right by this House.

My Lords, from the time of *Bywater's Case* (1) down to the present day, there is no instance of any appeal to this House from the Court of Justiciary; and it would be somewhat strange to imagine that during the period up to the Union, and during the period of nearly two centuries which has elapsed since the Union down to the present time, there should, during all that time, have been slumbering a right to maintain an appeal from the Court of Justiciary, either to the Scottish Parliament in the first period, or to this House, since the Union, and that that right should never have been resorted to by any of the hundreds and thousands of those persons whose interest it would have been to resort to it.

Your Lordships have in the printed cases before you the statutory enactments which have been made with regard to the Court of Justiciary in modern times; statutory enactments which have provided, sometimes by way of definition, sometimes by way of enlargement, for the jurisdiction to be exercised by the Court of Justiciary. In all of those statutes the orders and sentences of the Court of Justiciary are made final and conclusive. It appears

(1) 2 Paton's App. 564.

(2) Maclaurin, 382.

(3) 2 Paton's App. 569.

to have been assumed whenever the Court of Justiciary was legislated for, that it was a final Court from which no appeal lay. It would be very strange indeed if an appeal were to lie from the decisions and sentences of the Court of Justiciary outside those statutes and not from the decisions of that Court under those statutes.

My Lords, these considerations appear to me entirely sufficient for disposing of this case. I think that the attempt to maintain the right of appeal from an order of the Court of Justiciary is a pure experiment, altogether unwarranted by precedent, and which must fail the moment the history which I have attempted to narrate to your Lordships is looked into. I think that the petition of the Lord Advocate to have the appeal dismissed as incompetent ought to succeed, and that an order to that effect should now be made; and I move your Lordships accordingly.

Lord Hatherley:—

My Lords, I am entirely of the same opinion, and I think that a case has seldom been brought before your Lordships in which you have been so clearly guided to a decision by previous authority of the highest character. The personal authority and weight of judgment of Lord *Mansfield*, supported as that weight of judgment is by the authority of preceding cases, entirely, as it seems to me, on every ground disposes of this case.

I cannot follow Mr. *Hemming's* argument, founded upon what he conceives to be the course that the appellate jurisdiction took after the Union. He has endeavoured to satisfy your Lordships that the appellate jurisdiction stands simply in this position, that everything that was not forbidden by the Act of Union, or under the Articles of Union, ratified by that Act, would take the course of the English jurisdiction, and that all the decisions of all the tribunals in *Scotland* would fall to be decided according to an analogy (for it could only be an analogy, and that in some instances a very distant one) with what would be done in *England* upon decisions of a similar character of inferior tribunals as to the subsequent correction of them upon appeal.

I apprehend that what we must really look to is this:—we must see to what revision the judgments of the Courts in *Scotland* were liable anterior to the Act of Union. We find that the judgments of the Court of Session were, as is narrated in the Petition of

Right, presented to King *William* III. in 1689, subject to revision by the Scottish Parliament in the manner there pointed out. Then we have to inquire what was the position of the decisions of the Justiciary Court in case any correction should be thought necessary with regard to those decisions. We cannot find that any such course took place with respect to them; and we have this satisfactory statement on the part of Mr. *Hume* (1), who has been cited as an author deserving of the highest deference in respect to his industry and judgment. After having gone through several cases in detail, he says:

> I presume to add that in the course of my researches, which have extended to the oldest genuine records of the Courts of the Justiciar and his deputies, I have not met with anything in the nature of an appeal to Parliament beyond a mere protest, not followed with any proceeding, or which tends in any wise to shake that account of our ancient course of practice on which the Lord Advocate's Report in *Ogilvie's Case* and the judgments in other cases are bottomed. It is true that in some instances the Justiciar and his deputies do appear to have gone to Parliament for instruction or advice: as in the case of *Blair* and *Lawson*, where, on the supplication of the justice depute, the estates of Parliament gave their opinion that death is the punishment of forgery.

No doubt, my Lords, analogy was pursued so far as this: finding that an appeal lay from one Court to the Parliament in *Scotland* anterior to the Union, and finding that from another Court, namely, the Court of Justiciar, it did not lie to the Parliament of *Scotland* before the Union, your Lordships' House after the Union said, We must supply the place of the Parliament of *Scotland* with such little changes as may be necessary, we will not hear those cases from the Justiciary Court which were not heard by the Parliament of *Scotland* before the Union.

Mr. *Hemming* tells your Lordships that there was no doubt whatever of the jurisdiction for the first fifty years after the Union. It may be so, because there really was no case to call for a doubt in this respect.

As to the *Elgin Case* in 1713, it was clear that the real point at issue was a civil right which all parties were desirous of having tried. The course taken was to indict the magistrates for the course they had pursued. The Justiciary Court saw what was the object of the parties, namely, to have the civil right tried, and they sent it to the Court of Session to try, and when the Court of Session had tried it and remitted it back to the Justiciary Court with their finding upon it, the Justiciary Court acted thereupon and imposed a fine, and they made the magistrates pay the costs. It is important to observe that when the case came up to your Lordships' House nobody raised the question of jurisdiction. It is from that that I assume that all parties were anxious to have the civil right tried and determined. Nobody opposed the matter being heard; the matter was heard, and the main finding was reversed. Certainly I am bound to say that your Lordships' House did in that case proceed to deal with the decision of the Justiciary Court as well as with the decision of the Court of Session; but the House dealt with it simply as founded upon the conclusion which the Court of Session had come to, and having reversed the decision of the Court of Session your Lordships' House proceeded to hold that the judgment of the Justiciary Court must fall with it. That is the way in which Lord *Mansfield* explains that case; and really, when you have gone through these two cases, and when you have looked at the third case—the case of bribery—you have considered every case which it is necessary for us on the present occasion to consider.

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(1) Hume on Criminal Law.

The last case—the *Dempster Case,* with regard to bribery—is a very singular one indeed. My noble and learned friend on the woolsack has stated exactly how that case stood. So far from your Lordships' House having there come to any decision upon an appeal, it is perfectly plain that from beginning to end of the proceedings this House felt very much embarrassed at having anything to do with the matter at all. In that case, although the House was clearly of opinion that the Court of Justiciary was wrong, yet they did not take it upon themselves to interfere with the decision directly. I think that a stronger instance of the doubt which the House felt as to its jurisdiction could hardly be cited. While holding manifestly a decided opinion that the Court of Justiciary had fallen into an error, the House took the mild course of letting the matter stand over, recommending the Judges of the Justiciary Court to think a little more about it, and see upon what they had founded their decision.

Before the case arose on which Lord *Mansfield* expressed his opinion there had been one or two other cases, of which the case of *Ogilvy* was one. That case stood in rather a peculiar position, and it does not throw much light upon this particular subject. The other was a case of a conviction of felony. In that case the House of Lords, after referring the matter to a committee, came to the conclusion that they could not interfere.

Then came the case of *Bywater* in which Lord *Mansfield*, with his usual perspicuous detail of the transaction, leads you up to the conclusion that he himself had arrived at, namely, that there was no jurisdiction; and so it was held and determined.

Now, my Lords, if there was no jurisdiction with regard to matters of that description, I think your Lordships can have very little hesitation in coming to the conclusion that upon a matter such as we have here the jurisdiction could not be upheld. The Petitioner in this case sought to obtain authority to proceed in a criminal prosecution, although he could not obtain the concurrence of the Lord Advocate; and he asked either to have that concurrence obtained by an order of the Court of Justiciary or to obtain from that Court the power to proceed without any such concurrence. I am clearly of opinion upon the argument we have heard, that this is not a Court of Appeal from the Justiciary Court in *Edinburgh*, and certainly least of all would it be a Court of Appeal in such a case as is here brought before us.

On these grounds, my Lords, I concur in the motion which has been made by my noble and learned friend.

Lord O'Hagan :—

My Lords, I am of the same opinion. The Treaty of Union between *England* and *Scotland* expressly provided (Article 19) that the Scottish Court of Justiciary should continue as it had theretofore been constituted; and although in the argument of Mr. *Hemming* everything has been urged which ability and research could bring to the aid of the Appellant, it has not really weakened the force of the statement of Mr. *Hume*, that the judgments of that Court were not subject to revisal "in any form of process," and of the fact that they never were revised, in any recorded case, by the Scottish Parliament, or otherwise, before the Union. It has not displaced the allegation of the Lord Advocate in the *Ogilvie Case* that there is no vestige of such a process either in the records of the Parliament or of the Court itself.

Your Lordships are asked to entertain an appeal for which there is no precedent. As it was before the Union, so it has been during the 170 years which have since elapsed. No such appeal has ever been admitted by your Lordships' House. Several cases have been the subject of discussion at this Bar, and by my noble and learned friends, and I shall not occupy time by further adverting to them. I shall content myself by saying that the only one of them, the *Elgin Case* (*Innes* v. *Dundas* (1)), on which, in my opinion, the Appellant has even a plausible ground of reliance, is clearly distinguishable, and has been authoritatively distinguished by Lord *Mansfield* in such a way as to deprive it of all weight in the circumstances with which we are at present dealing. The civil proceedings of the Court of Session were the real subject matter of that appeal. The criminal proceedings in the Court of Justiciary were merely a corollary to them, were confessedly founded upon them, were necessarily consequential and absolutely ruled by the issue which they had. Throughout the case its civil character was dominant; and brought it legitimately within the jurisdiction of this House. Besides, in the *Elgin Case*, as Lord *Mansfield* noted, no objection was taken, or could have been taken to that jurisdiction, because, in the words of that most eminent Judge, "The foundation is the civil sentence of the Court of Session." It is idle to rely upon a case in all respects so diverse from that before your Lordships, and yet, I repeat, it is the only one which seems to me to give any countenance to the Appellant's contention.

My noble and learned friend upon the woolsack has sufficiently disposed of the order in *Geddie* v. *Dempster* (2), which, rightly considered, gives no countenance to the Appellant's contention.

The judgment of Lord *Mansfield* in *Bywater's Case* is decisive and unequivocal on the very point before us; and if it needed confirmation, as it does not, that confirmation is abundantly supplied by the cases of *Mungo Campbell* (3) and *Murdeson* and *Miller* (4).

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(1) 2 Hume, 505.

(2) Lords' Jour. xxxii. 132.

(3) *Mungo Campbell* shot the Earl of *Eglinton* in 1769, and was tried before the Court of Justiciary and sentence pronounced against him. He appealed to the House of Lords. His appeal was dismissed. See Lord *Mansfield's* commentaries in the *Bywater Case*, 2 Paton, 567; Maclaurin, 467.

(4) Both sentenced to death for sheep stealing in 1773. Their appeal to the

It is conceded that from a capital sentence of the Court of Justiciary no appeal would lie to your Lordships. In despite of the repeated rulings of the House, no one could maintain the contrary view; and I apprehend that sentences, not capital, would be, for the same reason, beyond the range of its appellate jurisdiction. Is not the present case rather *à fortiori?* If formal judgments be unappealable, is there in reason or policy—authority and precedent wholly failing the Appellant—any pretence for asserting the right of appeal in a question of simple procedure where the object is to invoke an unexampled interference with the exercise of the undoubted discretion of a public prosecutor? With deference, I think there is not. The highest interests of society require that that discretion should be reasonably maintained and used freely whilst it is used honestly, and I do not know that this House possesses the means or the machinery for controlling or regulating it to the advantage of the public.

Without occupying further time, I express my full concurrence with the noble Lords who have preceded me, and I take leave to add that whilst in determining generally on the question of jurisdiction we have nothing to do with the merits of this particular case, I am glad that your Lordships are not compelled even to entertain a controversy with reference to a decision of the Lord Advocate which appears to me to have been perfectly just and wise.

Ordered that the said petition and appeal, being incompetent, be not received; and farther ordered that the said Angus Mackintosh do pay to the Lord Advocate the costs incurred in respect of this matter.

Agents for the Appellant: *Simson, Wakeford, & Simson.*
Agent for the Crown: *Hugh Hope.*

House was referred to a committee, who were of opinion that "the appeal ought to be rejected." The report was agreed to; and *Murdeson* and *Miller* were both hanged: Lords Journals, vol. xxxiii. p. 522.

[HOUSE OF LORDS.]

WALKER . . . . APPELLANT;

PRESBYTERY OF ARBROATH *et al.* . . . RESPONDENTS.

H. L. (Sc.)
1876
Nov. 24.

Compulsory Enlargement of a Churchyard by Order of Presbytery.

Held, that an order of Presbytery for the enlargement of a churchyard having been preceded by sufficient anterior notice to the landowner and others affected, was not to be impeached on the ground of mere informality.

Per THE LORD CHANCELLOR (1):—A Presbytery does not proceed on fixed and settled *formulæ* with regard to notices; but in this case it appears to me that, both in form and in substance, the Presbytery gave a notice such as fairness required of their intention to exercise jurisdiction.

THE churchyard of *Barry*, in *Forfarshire*, proving insufficient for burial purposes, the heritors, in order to enlarge it, made an offer for an adjoining piece of land belonging to the Appellant, who rejected the offer on the 11th of November, 1874. Subsequent negotiations proved unsuccessful. A petition was therefore presented by the heritors to the Presbytery of *Arbroath*, on the 6th of April, 1875, asking them to inspect the churchyard and to designate so much of the land in question as might be considered a suitable addition.

On Sunday, the 18th of April, 1875, in pursuance of an order from the Presbytery, intimation was given from the pulpit of *Barry*, and was published on the church doors, informing all concerned, including the Appellant, who was present, that on the 6th of May then next the Presbytery "would visit and inspect the church at one o'clock, afternoon." Notice to the same effect was also inserted in the *Dundee Advertiser*.

On the 6th of May, 1875, the Presbytery inspected the churchyard. They found that it required enlargement; and they designated a portion of the Appellant's land as an addition to the churchyard, ordaining the tenants to remove therefrom at Martinmas then next.

On the 17th of May, 1875, notice was sent to the Appellant that a meeting of Presbytery would be held on the 17th, to take steps

(1) Lord *Cairns*.

for an addition to the churchyard, which meeting he was requested to attend. The Appellant did not attend either of these meetings. But in September, 1875, he applied to the Court of Session for an interdict against further proceedings in the matter.

The Lord Ordinary (1) granted the interdict sought, and added the following note:

> It is admitted that the complainers had no notice of the presentation of the petition of the heritors to the Presbytery on the 6th of April, of the meeting of Presbytery on that day, or of the proceedings thereat, other than the subsequent intimation from the pulpit and the advertisement. I assume that this was good notice of the resolution of Presbytery "to visit and inspect the churchyard" on the 6th of May, as a preliminary to designation, but it was, I think, no notice that the Presbytery would, at a meeting to be held immediately after the inspection, and on the same day, proceed to designation. This, however, they did. Mr. *Walker*, as an heritor, was, by 31 & 32 Vict. c. 96, s. 3, entitled to appeal to the sheriff within twenty days. It does not appear that he had any notice of the judgment of the 6th of May, or of the subsequent judgment of the 17th of May, prior to the letter of the 22nd of July. That the heritor was thus deprived of his statutory right to appeal, is in my opinion sufficient to warrant the suspension now asked.

The Presbytery reclaimed to the First Division of the Court of Session, who, upon advising, pronounced the following judgment:

> The Lords, having heard counsel, recal the Lord Ordinary's interlocutor, and refuse the interdict (2).

Against this decision Mr. *Walker* and his tenant appealed to the House, having for their counsel Mr. *Cotton*, Q.C., and Mr. *Duncan* (of the Scotch Bar).

Mr. *Southgate*, Q.C., and Mr. *Gloag* (of the Scotch Bar) appeared for the Respondents.

At the close of the argument, the following opinions were delivered, going very fully into the facts of the case:—

The Lord Chancellor (3):—

My Lords, the churchyard of *Barry*, in *Forfarshire*, being regarded by the heritors and inhabitants as too small for the increasing population of the principal place in the parish, namely the town of *Dalhousie,* we find that on the 18th of February, 1874, a meeting of heritors took place upon the subject. Mr. *Walker* (the Appellant) was present, and he was chairman. At that meeting

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(1) Lord *Young*. (2) Lord *Ardmillan* dissenting, 4th Series, vol. iii. p. 498.
(3) Lord *Cairns*.

> After due deliberation on the present and prospective circumstances of the churchyard, and hearing the sexton's statement; on the suggestion of Mr. *Walker*, Mr. *Stevenson* moved, and Mr. *Borrie* seconded, that the meeting be adjourned to the 4th of March ensuing, at one o'clock afternoon, in order to obtain a fuller meeting of members.

What was done at the committee meeting of the 4th of March, we are not told; but afterwards, on the 19th of March, a meeting of the heritors took place, at which again Mr. *Walker* was present; and your Lordships have this information as to the opinion of that meeting of the heritors,

> The meeting having had under consideration the state of the present burial ground of this parish, is unanimously of opinion that some steps must immediately be taken either for the purpose of enlarging the present burying ground, or for acquiring ground in some other part of the parish, for the purpose of burial.

Therefore your Lordships have the opinion of the Appellant that the churchyard should be enlarged; and of course he must have been aware that one, and not the most unlikely, mode of enlarging it would be by means of his own land, which was in actual contact with the churchyard.

On the 1st of October, after an interval of some months, there was another meeting of the heritors. At that meeting Mr. *Walker* was not present,

> But those who attended, having had under consideration the necessity of providing additional burying ground for the parish, were unanimously of opinion that the most suitable ground for this purpose was the small field immediately adjoining the present burying ground to the north of the existing churchyard, belonging to *James Walker*, Esq.

Then they came to a resolution as to the offer which should be made to Mr. *Walker* for a portion of his ground, and the clerk was instructed to transmit to Mr. *Walker* an extract of this minute, and a committee was chosen with power to carry into effect the resolutions aforesaid, and report to another meeting.

By the minutes of the 19th of November, 1874, it appears that on the 2nd of October, the clerk immediately communicates with Mr. *Walker*, and Mr. *Walker* was then made aware not merely that the churchyard was to be enlarged (to that he had assented), but that the opinion of the heritors was that the enlargement ought to be made out of his ground, and that they were willing to pay him a certain price for it. It further appears from the minute of this same meeting of the 19th of November, that an answer had been given by Mr. *Walker*, stating the price at which he would sell, but the meeting thought that price unreasonable, and declined to entertain it. Then a suggestion was made that some person else might be willing to sell a piece of land in the neighbourhood of another part of Mr. *Walker's* property, and that that might be exchanged by the heritors for the piece of ground of Mr. *Walker's* which they wanted for the enlargement of the churchyard. And the meeting appointed some members of the committee as a deputation to wait upon Mr. *Walker*, and ascertain whether he would fall into this alternative plan. In the minute of the 1st of December, 1874, there is a report of the interview which the committee had with Mr. *Walker*, from which it appears that he declined the exchange and adhered to his former offer as to price.

In the year 1875 there was a meeting of heritors on the 18th of March. The opinion of counsel had been taken as to the difficulty the heritors were in, and I infer that counsel had advised that it would be better if the heritors were to hand over the further conduct of this matter to the Presbytery.

A petition was accordingly prepared and signed by a number of of heritors in the parish, and was presented to the Presbytery.

The minute of the meeting of the Presbytery is of the 6th of April, 1875—it is in these words:

> The petition was read, and the Presbytery having considered the same, resolved to visit and inspect the churchyard of *Barry* on Thursday, the 6th day of May next, at 1 o'clock p.m., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same; and they directed the minister to intimate this petition and the time fixed for the visit, from the pulpits and on the church-door, and also by advertisements.

Therefore your Lordships, I think, can have no doubt that whatever may be the effect of the intimation when it was given, the object and intention of the Presbytery was that there should be an intimation given in the kirk that they were going on the 6th of May to the churchyard, not alone to consider the question of the

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enlargement of the churchyard, but to designate a piece of ground which would be suitable for the purpose. And in that respect they were acting upon the petition, because the petition had stated to them, not merely that the churchyard ought to be increased, but "that at a meeting of the heritors, held on the 1st of October, 1874, it was unanimously agreed that a piece of ground immediately adjoining the churchyard on the north side is the most suitable and convenient as an addition to it," namely, Mr. *Walker's* piece of ground.

Your Lordships, therefore, before you come to the intimation in the kirk, approach it with this knowledge, that this matter had been a subject of general consideration throughout the parish, and among the heritors; that it was perfectly well known to Mr. *Walker*, and that Mr. *Walker* was himself of opinion that the churchyard ought to be enlarged; that he knew that the heritors desired to enlarge it by means of a piece of ground belonging to him, and that he was, or had been, in controversy with the heritors as to the price: and, therefore, if he heard, as I shall afterwards shew he did hear, the intimation as to what the Presbytery were going to do, he heard that with a knowledge of all that had gone before, shewing the desire of the heritors as to the mode and form of the enlargement of the churchyard.

My Lords, the intimation which the Presbytery had ordered was given in the kirk on the 18th of April, and your Lordships have it admitted that Mr. *Walker* was present in the kirk and heard that intimation. The intimation, therefore, must be read as it would appear to the mind of Mr. *Walker*, who knew everything which had taken place up to that time, and who knew the piece of ground which was referred to in the intimation as the source from which the enlargement was to take place. With that knowledge on his part, this intimation is made in the kirk:

> Intimation is hereby given to the heritors of this parish and all concerned, that a petition has been presented to the Reverend the Presbytery of *Arbroath*, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday, the 6th day of May next, at one o'clock, afternoon, at which time the heritors and all others concerned, or persons duly authorized to act for them, are requested to attend.

Now, my Lords, as regards Mr. *Walker*, this to his mind of course would read just as if his own name had been mentioned in it—as if it had been an intimation that a petition had been presented to the Presbytery, craving them to set apart Mr. *Walker's* piece of ground for an addition to the churchyard, and that the Presbytery would visit and inspect the churchyard at one o'clock on Thursday, the 6th of May, at which time Mr. *Walker*, for he was one of the heritors, was required to attend.

The inference which any person ought to draw from the intimation is, that the Presbytery upon the day named is coming to the churchyard for the purpose of considering that proposal which is mentioned in the introductory part of the intimation, namely, the designation of the particular piece of land, or other suitable piece of land, mentioned in the introduction. Your Lordships cannot of course tell what passed through the mind of Mr. *Walker*, but I am bound to say that any person of ordinary understanding ought to have concluded that this was the meaning of the intimation, and that in any Court Mr. *Walker* must be held to have received an intimation which has that natural and fair construction.

I should be extremely unwilling, under any circumstances, to hold as inapt or irregular, merely upon a matter of form, the proceedings of a Presbytery, which is not a Court of Law, and which does not proceed upon fixed and settled formulæ with regard to notices or other documents; but in this case it appears to me that both in form and in substance, upon a fair construction of the notice, the Presbytery had given a notice such as fairness required them to give before they were proceeding to designate the land under their powers.

The intimation does not stop there, because a subsequent notice was given on the 11th of May, following that which was given on the 18th of April. The notice of the 11th of May was not a notice in the kirk; it was a notice in a letter addressed to the Appellant personally, informing him that

> The Reverend the Presbytery of *Arbroath* will meet at *Barry* on Monday, the 17th instant, within the Parish Church at *Barry*, at 1.39, P.M., to take further steps towards making an addition to the churchyard at *Barry*, which meeting you are requested to attend.

It seems to me that this second intimation ought to have told him that the first step had been taken, and had resulted in the opinion that the churchyard should be enlarged, and that the Presbytery were now going to take the second step which had been referred to in the former intimation, namely, to designate his piece of ground as the ground by the addition of which the enlargement ought to be made.

My Lords, I have no hesitation in adopting the conclusion arrived at by the Lord President, and the majority of the Court below, that there was in this case a sufficient intimation to the Appellant of their intention to exercise that jurisdiction for the purpose of designating his land.

I now turn to the other point, namely, had the Presbytery the jurisdiction in this case to proceed to designate land for the enlargement of the churchyard? The only objection made to their jurisdiction is one which did not meet with favour from any of the Judges in the Court in *Scotland*. The jurisdiction of the Presbytery to designate land for the enlargement of a churchyard is not a primary or original jurisdiction, as it were; it arises only upon the failure, or the refusal, of the heritors to enlarge the churchyard and to procure ground for the purpose. The duty, argues the Appellant, lies in the first instance upon the heritors to enlarge the churchyard; if they neglect it, or if they refuse to perform it, the Presbytery may step in and exercise their jurisdiction; but their jurisdiction does not arise until there is a failure on the part of the heritors, and there was no such failure on the part of the heritors here.

I will assume, though I desire not to be understood as affirming, that the view taken by the Appellant of the law is correct. The old statute (1) upon the subject is very obscure, and I should be sorry myself to appear to be defining what is the jurisdiction of the Presbytery, or how it arises; but I will assume that the Appellant is right in his statement of the law. If the law be as he states it, of course it is obvious that the reason of the law must be that until there has been some neglect by those who ought to be the best judges of the manner of the enlarging the churchyard, and who will have to pay for the enlargement, the law does not desire to take the matter out of their hands and to place it in the hands of what I may term an external body who are not the body to pay for the enlargement. On the other hand, the law says that that which is necessary must be done; and if those who ought to do it fail to do it, then the Presbytery are to be allowed to exercise their rights. But suppose that in point of fact they do not enlarge it—suppose that they say, We cannot make a bargain of a satisfactory kind with any owner of land for the purpose of procuring an enlargement which we all admit to be required? Are the Presbytery to be paralyzed by the mere fact that the heritors have made no refusal, but have simply done nothing?

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(1) The Act 1563, c. 76; see Duncan's Parochial Law of Scotland.

Suppose the heritors come to the Presbytery and say, We do not desire to stand in your way; we do not desire to be supposed to be persons who are going to enlarge the churchyard, or to take any steps towards acquiring land for that purpose; we find the difficulties to be such that we abandon it in despair, and now you must look upon us as asking you to step in and to exercise the right which we might have exercised. It would appear to me to be the most monstrous and violent, and the most inconvenient proposition possible, and one for which I know of no authority, to contend that in that state of things the jurisdiction of the Presbytery is not to arise just as much as if the heritors had been contumacious, had denied that there ought to be an enlargement at all, or, admitting that there ought to be an enlargement, had refused to take any steps for the purpose of procuring that enlargement.

If the heritors had been able to do so, they would have made a bargain with the Appellant, and have bought his land and enlarged the churchyard, but they found they could not do that, and they took the opinion of counsel. The difficulties of their position being pointed out to them, they gave up any idea of acting. They presented that petition to the Presbytery in which they abandoned any intention of acting, and asked the Presbytery to proceed upon the footing that they, the heritors, were not going to act. My Lords, if the law be such that the Presbytery cannot act unless there be a failure by the heritors to act, then I say that in this case there was that failure, and the jurisdiction therefore of the Presbytery arose.

Upon the whole I submit to your Lordships that this appeal is one which does not rest upon any solid foundation, and that it ought to be dismissed with costs.

Lord O'Hagan:—

My Lords, I have had some difficulty, during the argument of this case, in reaching a conclusion satisfactory to myself.

Undoubtedly no man's property should be taken from him for any purpose, private or public, in the absence of such notice as may enable him to assert his right and offer such reasons in respect both to the taking and the terms of the taking as may secure him justice and adequate compensation. Now in this case neither the statement to the congregation, of which the Appellant appears to have been a member, nor the letter addressed to him personally, made any express reference to the designation or the valuation of this land. The statement only announced that on a given day the Presbytery would "visit and inspect," and did not declare that they would "designate" the ground. And the letter merely made the intimation that they would meet within the parish church "to take further steps towards making an addition to the churchyard." It is further to be observed that in neither case was the Appellant addressed as the owner of the land in controversy, but only as one of the heritors of the parish.

Now I think it very unfortunate that a more full and unequivocal indication of the intentions of the Presbytery was not given, for if it had been, this wretched litigation, at such heavy cost, about an interest so trivial, could not have been maintained. But when we are asked to set aside the entire proceedings and declare them of no effect, we must consider the position of the Appellant, and the means substantially afforded him for self-protection. The notice published from the pulpit, affixed to the church door, and inserted in the newspapers, had more in it than the announcement of intention to "visit and inspect." It recited the petition craving the Presbytery "to design and set apart the piece of ground immediately adjoining the churchyard on the north or other suitable piece of ground." The piece of ground "on the north" was the ground of the Appellant, as to which there had been much negotiation, and which everybody knew the Presbytery wished to acquire; and, taking the whole notice together, I incline to agree with the Lord Chancellor, that the "visit and inspection" being undertaken in pursuance of a petition "to design and set apart," the Appellant might reasonably have been expected to see for himself that nothing should be done to prejudice his rights. He knew what was desired and what was contemplated. He had had interviews about the ground. He had had offers for it, and it would have been easy for him to guard himself from injury by his presence or that of a representative at the inspection to which he was invited.

Then, as a matter of fact, can we reasonably doubt that he had knowledge of the doings of the Presbytery on the occasion of their visit, quite time enough to appeal, if he had been disposed to do so? The churchyard is in the immediate vicinity of the Appellant's residence. His complaint rests very much on the allegation that the "amenity" of the property will be injured by its extension, so that the addition will become visible from the windows of his mansion-house. Is it conceivable in such circumstances that he should not have inquired about the proceedings of the Presbytery, almost at his very door, upon the 6th of May, or that he should not have heard of their designation of the ground? If he did know of it, the lapse of the time for appealing occurred through his own default.

Next we have the letter of the 11th of May inviting him to meet the Presbytery on the 17th of May, with a view to the taking of further steps "towards making an addition to the churchyard." He may not have been bound to attend that meeting, but he was free to do so; and he must have understood it to have been designed to complete a proceeding already taken, and, if he had attended, he would still have had full time and opportunity to make his appeal.

This being the history of the matter, I think it important to note that there is no impeachment of the *bona fides* of the Presbytery. They did not seek to deceive or overreach the Appellant. They took the best advice they could get in *Scotland*, and acted honestly upon it for the general interest. And their proceedings are not lightly to be set aside, if your Lordships are of opinion that although, technically, the notices might have been better framed, the Appellant did not suffer wrong, but had substantially such information given to him as should have been sufficient for the protection of his rights.

Then we must not forget that there was no hard and fast line of procedure imposed upon the Presbytery. They acted, as was said in the Court of Session, under a jurisdiction regulated by the Common Law—the regulation of it depended on established usage—and that usage is authoritatively described by the Lord President, when he says:

> We have been referred to the forms and styles in Church Courts, which are well known and published and acted on every day, and in analogous cases when styles are provided, we certainly find a great deal of authority for holding that an intimation of this kind, conveyed in general terms, and making reference to the prayer of the application which is before the Presbytery, is quite sufficient notice to everybody concerned (1).

And Lord *Mure* speaks of the practice to the same effect:

> All this is done in the usual mode of giving notice by the Presbyteries of proceedings before them, as I understand the Style Book (1).

It is very hard for strangers to *Scotland* to resist the force of such testimony, as to a local practice, coming from those whose position and experience must make them especially conversant with it.

And, finally, my Lords, it is plain that, according to the law of *Scotland*, the Court of Session had no power, and your Lordships have no power to supervise or review or correct the action of the Presbytery. We can only interfere if there has been some flagrant violation of the fundamental principles of justice, resulting in substantial wrong to an individual, which it would be contrary to the universal course of legal tribunals to allow. We are not asked to amend a statutable or other irregularity, but to declare the proceedings absolutely null and void, on the ground that they have been essentially inequitable, and can we do this, having regard to the good faith of the Presbytery, the substantial intimations of its purpose given to the Defendant, and the opportunities afforded to him of resisting any wrong?

As to the question of jurisdiction, I shall add nothing to the observations already made. The Scottish Judges were unanimous upon it, and I see no reason to doubt that they were right.

I therefore give my concurrence to the proposition of the Lord Chancellor.

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(1) 4th Series, vol. iii. p. 498.

LORD BLACKBURN:—

My Lords, the heritors of the parish of *Barry*, in their petition to the Presbytery of *Arbroath*, stated what seems to be agreed on all hands:—

> That the providing and maintaining of a churchyard sufficient in extent for the wants of the parish, is a burden incumbent on the heritors of each parish, and the duty of enforcing the obligation belongs to the Presbytery of the bounds.

Now, my Lords, it appears that by the 31 & 32 Vict. c. 96, the Presbytery having this jurisdiction, are finally subject to a particular appeal, which must be brought within twenty days. The Presbytery here having proceeded, and the appeal not having been brought within the twenty days, what the Presbytery have done cannot be looked into. It was urged, and I think correctly, by the Appellant below, that although it is true that you cannot inquire into what the Presbytery have done in the interim, yet the Presbytery must pursue their jurisdiction properly, and it is the very essence of justice, and runs through the law of every country, that where proceedings are to be taken which may have the result of taking away a man's land, you must intimate to him sufficiently what you are going to do, that he may come and be heard, and shew, if possible, that you ought not to take away his land.

The real question here seems to me to be whether the intimation given to Mr. *Walker* of what the Presbytery were going to do was a sufficient intimation to fulfil the requirements of justice. I do not understand that any of the Judges in the Court below doubt that it was necessary to shew that Mr. *Walker* had such notice given to him as to enable him to come and defend his rights. The question was whether or not the notice actually given to him was sufficient. The Presbytery having taken into account the petition, which clearly asked them to designate this particular piece of land, determine that they will meet on "the 6th day of May next at 1 o'clock P.M., with a view to fix upon a piece of ground suitable for designating as an addition to the churchyard, if they shall find the same to be necessary, and to designate the same." Then they proceed to direct that the minister shall intimate that from the pulpit and elsewhere.

The Presbytery there express in the clearest words possible that they intended to meet at the churchyard for the purpose, amongst other things, of designating the piece of land. It is very true that upon the undisputed question of whether the churchyard was too small or not, a personal inspection by the Presbytery might have afforded them evidence of that, and have shewn them that the churchyard was overcrowded, but it is quite plain that upon the question of which was the most convenient piece of land to be added to the churchyard, the personal inspection which they actually performed was of the greatest importance. The Presbytery themselves had made the most clear statement that they were going there for that very purpose; but unfortunately the intimation which has caused this litigation is in more general words. It is this:

> Intimation is hereby given to the heritors of this parish and all concerned, that a petition has been presented to the Reverend the Presbytery of *Arbroath*, craving them to design and set apart the piece of ground immediately adjoining the churchyard on the north, or other suitable piece of ground, for an addition to the same, and that the Presbytery are to visit and inspect the churchyard on Thursday the 6th day of May next at one o'clock afternoon, at which time the heritors and all others concerned, or persons duly authorized to act for them, are requested to attend.

Now, my Lords, the Lord Ordinary and Lord *Ardmillan* (1), thought as a matter of fact that this notice did intimate to those who were present, and Mr. *Walker* was present and heard it, that the Presbytery were going to meet at the churchyard, but that although the Presbytery in point of fact were going to meet at the churchyard for the purpose of viewing and designating the land if they thought proper, with power to adjourn any matter for decision afterwards, Mr. *Walker* had a right to suppose, and would naturally suppose, that they were merely going to look at the land and do nothing more. I think, for the reasons I have stated, that the natural and *primâ facie* impression of any one who read or heard that notice, and knew what the nature of the thing was, would be that the meeting of the Presbytery upon the ground in order to view it, must have been principally for the purpose of ascertaining the suitability of the ground on the north for the addition, and of designating that piece of ground. But when we find what the Lord

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(1) 4th Series, vol. iii. pp. 502–509.

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President states as the styles and forms of the Court of Presbytery and the manner in which they conduct their business; when we find that according to his statement an intimation of this general sort concurring generally in the terms of the petition, has always been held sufficient; and when we consider that Mr. *Walker*, or at all events his advisers, knew what were the styles and forms of the Court of Presbytery; I cannot bring myself to doubt that, upon hearing this intimation, he ought to have known that the Presbytery were to meet at the churchyard for the purpose of taking steps then and there to fix upon this land as the land which was to be added to the churchyard; and if he did not choose to go, and consequences followed, and things passed behind his back, it was his own fault.

I think, my Lords, that is greatly confirmed by the fact that the Presbytery, not having ascertained the value of this piece of land, adjourned that matter to a future occasion, and there were further steps taken; and although formal notice was given, through the clerk, to the heritors, and, among others, to Mr. *Walker*, of the adjourned meeting, still Mr. *Walker* did not attend. I quite agree with what has been said, that that further shews that Mr. *Walker* was to blame; for, had he attended then, he would have known what they were doing, and he would have had an opportunity of appealing if he had wished to do so. Even if the twenty days ran, not from the time when the notice was given to him of the meeting of the 17th of May, but from the 6th of May, they would not have run then. It seems to me, my Lords, that he had complete and sufficient intimation of what the Presbytery were going to do, and consequently he cannot establish the want of such notice, as I quite agree with all the Judges below in thinking, was necessary. I think that such notice was amply given; and consequently that what the Presbytery did was with full jurisdiction, and if Mr. *Walker* lost his opportunity of appealing, it was owing to his own fault, which cannot now be remedied.

Consequently, my Lords, I agree that the judgment of the Court below ought to be affirmed, with costs.

LORD GORDON:—

My Lords, I desire to express my own individual concurrence in the views which have been stated in support of the resolution proposed by my noble and learned friend on the woolsack. I regret hat there has been so much litigation in this case, but as the parties thought proper to raise a somewhat narrow point, it is quite right that it should have received the very careful consideration both of the Court below and of your Lordships.

The first question which arises is whether the Presbytery had jurisdiction to designate the land which belonged to the Appellant. As to that, there appears to be no doubt whatever expressed in the Court below. I do not see any suggestion on the part of the Lord Ordinary that there was any doubt as to that; and I find also, on looking at Lord *Ardmillan's* judgment, that he expressed a very clear opinion that he had no doubt whatever as to the jurisdiction. We have had an able argument from my learned friend, Mr. *Duncan*, whose skill in these matters is well known; but I think he has not established to your Lordships' satisfaction that the Presbytery were not entitled to act in the manner in which they did act under the circumstances of this case; for although he pushed his argument as far as to say that it was necessary that there should be contumacious opposition on the part of the heritors, I venture to think that that is not correct; and if there has been default and failure to perform a duty incumbent upon them by law, then the duty of the Presbytery to compel them to do so does come into operation. I apprehend, therefore, in the first place, that there is no question whatever as to the jurisdiction of the Presbytery to pronounce the judgment which is the subject of complaint.

But, in the next place, the ground upon which objection was taken to the judgment was that no notice had been given to the Appellant of the proceedings intended to be taken by the Presbytery. Now, after what has been stated by your Lordships so very clearly and with reference to the documents, particularly the intimation of the meeting of the 8th of May, which must have been known to Mr. *Walker*, who was present in church when the intimation was given, I think it is plain that he did receive due notice that the Presbytery intended to exercise their jurisdiction, and having received such notice it was his duty, if he intended to combat any resolution which they might adopt in the way of taking possession of his property for adding it to the churchyard, to have attended the meeting of the Presbytery; but he failed to do so. And even after the notice of the 11th of May was given to him, intimating that they were about to take further steps in the matter, he failed to appear before the Presbytery on the 17th. He did not avail himself of the opportunity which the law afforded to him, of stating his views to the Presbytery, and if they refused to adopt his views, of taking an appeal to the sheriff. In having thus neglected to avail himself of the opportunity given to him by the Presbytery of stating his objections to any designation of his land, I think he has put himself out of Court. He is not in a position to say that the land has been taken without due notice, and therefore I venture to think that, upon that ground, the judgment which was adopted by the Lord Ordinary, and adopted also by the late Lord *Ardmillan*, is not well founded, but that the opinions of the other learned Judges below are entitled to the greatest weight.

I do not think it necessary to trouble your Lordships by going over the details of the documents, because those have been sufficiently brought before your Lordships; but it is of importance to keep in view what has been stated by my noble and learned friend who has last spoken, that there is no allegation of a breach of a statutory form on the part of the Presbytery, neither is there any allegation of there being any deviation from any customary procedure on the part of the Presbytery. That, I think, has been clearly brought out in the opinion of the Lord President, and has not been challenged by anything which has been stated at the Bar.

That being so, my Lords, I think there was jurisdiction on the part of the Presbytery, and there was due notice given of the intention to exercise the jurisdiction in the way of dealing with this particular piece of land which is the subject of dispute. I do not go into the question as to whether there is not a strong reason for presuming that all the facts were substantially known to Mr. *Walker*. I venture, however, to think that the impression which must be left on the mind of everybody is that it is very difficult to conceive that he was in ignorance of the actings of the Presbytery with reference to this piece of ground in which he held so great an

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interest. Therefore, I think, under the whole circumstances of the case, your Lordships will be of opinion that the interlocutors appealed against ought to be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Agent for the Appellant: *William Robertson.*
Agent for the Respondents: *W. A. Loch.*

[HOUSE OF LORDS.]

WILSON *et al.* . . . . Appellants;
WADDELL . . . . Respondent.

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Mineral Workings.

The right to work mines is a right of property; which, when duly exercised, begets no responsibility:—

Per Lord Blackburn:—The owner of minerals has a right to take away the whole of them in his land, according to the natural course of user.

Subsidence of Surface—Injuries by consequent Waterflow.

Where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coal-field, the injuries, being entirely from gravitation and percolation, are not a valid ground for any claim of damages.

Obligation to restore the Surface.

Per Lord Blackburn:—Where there is an agreement between the owner and his tenant that, when the mines are worked out, the surface shall be restored, the owner may complain if it be not restored; but that gives no claim to any one else.

2 App Ca
784
6 Ch D.
11 Ch D.
12 Ch D
220,
14 Ch D
23 Ch D

THE contest in this case was between the lessees of two adjoining coal-fields in *Lanarkshire,* both lessees holding under the same landlord, Mr. *Houldsworth,* of *Coltness,* who took no part in the litigation. The above Appellants brought their action to prevent the flow of surface water from the Respondent's upper coal-field coming on the Appellants' lower coal-field and doing serious damage, in respect of which the Appellants claimed £2000 as reparation; and they also sought an order requiring the Appellants to execute certain works to prevent future inroads of water.

The defence of the Respondent was, that his operations had been conducted in the ordinary mode, with due and reasonable care; and that the influx of water complained of was by natural gravitation, and added to by the Appellants' own operations.

On the 6th of July, 1875, the Lord Ordinary (1) assoilzied the Respondent from the conclusions of the summons; holding that he had done everything that he was bound to do, and even more, to prevent the mischief complained of. The Inner House (Second Division) adhered to the Lord Ordinary's interlocutor (2), awarding costs against the Appellants; who thereupon appealed to the House, contending that the Respondent's operations were not of a reasonable and proper character, and that the Appellants, having suffered therefrom, were entitled to the remedies which they sought.

Mr. *Cotton*, Q.C., and Mr. *Lee* (of the Scotch Bar), were heard for the Appellants; and Mr. *Benjamin*, Q.C., and Mr. *Balfour* (of the Scotch Bar), appeared for the Respondents; but were not called upon, the consideration of the case being adjourned from the 23rd of November to the 1st of December, when the following opinion was delivered by Lord *Blackburn ;* stating the facts which gave rise to the action and the proceedings in the Court below—as well as the reasons for the final judgment which was ultimately pronounced by the House.

LORD BLACKBURN :—

My Lords, in this case the Lord Ordinary decided in favour of the Defender, on the ground that the evidence did not shew that the Defender had done anything wrong as against the Pursuers. The Second Division of the Court of Session affirmed this judgment. Lord *Gifford*, agreeing with the reason of the Lord Ordinary, but Lord *Ormidale* and the Lord Justice Clerk intimating that they were disposed to hold, on the evidence, that the Defender had so acted as to make himself liable for the damage sustained by the Pursuers, had it not been for the Pursuers' own acts, which their Lordships thought to have been of such a description as to bar and preclude their claim for reparation.

(1) Lord *Curriehill.*

(2) 4th Series, vol. iii. p. 288.

Your Lordships, on the 23rd of November, heard the counsel for the Appellants, who argued the whole case fully and ably, maintaining, first, that the conduct of the Defender was such as to make him liable to the Pursuers for the damage; and, secondly, that the ground on which Lord *Ormidale* and the Lord Justice Clerk based their judgment could not be supported, as the Pursuers had done nothing to preclude their claim to reparation.

Your Lordships have not thought it necessary to hear the counsel for the Respondent, who might have furnished arguments to shew that this second point furnished a good defence. It would not, therefore, be proper to say more than that, if it had been necessary to decide this point, the counsel for the Respondent would have been called upon to argue in support of the ground on which alone these two learned Judges below based their judgment.

But, my Lords, it is not necessary to decide anything on this point, if your Lordships are satisfied that what is alleged and proved does not make Defender liable to the Pursuers. And after hearing the able arguments of the counsel, and carefully considering the judgment of Lord *Ormidale*, I think that what is alleged and proved does not establish such a liability, and I believe all the noble and learned Lords who heard the case are of the same opinion.

I will now state the facts in the case, which are scarcely in dispute.

The Pursuers and Defender are both lessees, under the same landlord, Mr. *Houldsworth*, of the minerals under two adjacent portions of the *Coltness Estate*. The seam of coal called the Ell coal crops out to the surface in the Defender's holding. It lies at a high inclination, dipping towards the Pursuers' holding, and where it enters it, is at a depth of many fathoms below the surface, so that any water which fell on or percolated into the Defender's holding would necessarily, by force of gravitation, descend to the Pursuers' holding, unless stopped by the minerals or soil from doing so. The soil above this coal is stiff, and impervious to water, so that, whilst it was undisturbed, the greater part of the rainfall flowed away over the surface, very little of it filtering down to the seam, which was in consequence a very dry seam, the impervious strata above, whilst undisturbed, forming what may be called a roof practically water-tight over the coal. But the Defender altered this state of things. He worked the Ell coal, carrying away the whole of it, and, as a necessary result, the surface sank. At the upper part, where the seam cropped out to the surface, the subsidence over a space of about five acres was so great that the surface sunk into sits, and cracked into open fissures, through which the rainfall on these five acres flowed freely down into the Defender's workings, and, the coal in those workings having been removed, it flowed down towards the Pursuers' holding. There is evidence that part of this water was removed before reaching the Pursuers, but there seems no doubt that a considerable quantity of water which, whilst the roof remained in its original state, a water-tight roof, flowed away over the surface, did descend to the Pursuers' mines, and put them to additional expense in pumping it out.

My Lords, the question in the case seems to me to be whether this was *damnum absque injuriâ*, which the Pursuers must protect themselves from in such way as they can; or whether the Defender, when working the upper part of the mine, was under any obligation to the Pursuers, as owners of the mine on the dip, to preserve or to restore the impervious roof, which, whilst it existed, prevented a great part of the rainfall from descending.

I think it right to observe that it is not shewn that any water goes down these cracks except the natural rainfall on the surface. Your Lordships have not to consider what difference it might make if the bed of a natural stream had been tapped by the Defender's operations, and you have no need to form or express any opinion on the points discussed in the recent cases of *Smith* v. *Fletcher* (1), and *Crompton* v. *Lea* (2).

I may also observe, that no point has been discussed at your Lordships' Bar as to any difference in favour of the Defender, in consequence of his holding under the same landlord as the Pursuers, and by a lease prior in point of time to the Pursuers'. The case has been argued, and I propose to consider it, as if the Pursuers held under a different landlord, or were themselves the owners both of the soil and the minerals towards the dip. And in

(1) Law Rep. 7 Ex. 305; 9 Ex. 64.

(2) Law Rep. 19 Eq. 115.

this view the question seems to be, whether there is any servitude on the owner of the upper mines for the benefit of the owner of the mines on the dip to preserve either the surface or the subjacent minerals as water-tight as the undisturbed state of the strata.

My Lords, no authority has been cited either in a Scotch or an English Court in favour of the doctrine that there is such a servitude.

The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and that a servitude to prevent such an user must be founded on something more than mere neighbourhood. In *Rylands* v. *Fletcher* (1) in this House, the Lord Chancellor (2) thus expressed himself:

> The occupiers of a close might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if in what I may term the natural user of that land there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature. As an illustration of that principle I may refer to a case which was cited in the argument before your Lordships, the case of *Smith* v. *Kenrick*, in the Court of Common Pleas.

23ck

I think it unnecessary to cite other authorities, as this is not only one of the most recent, but is also in this House. And I do not understand Lord *Ormidale* to express any dissent from this doctrine, but to proceed on a ground which I will mention presently. I may observe, however, that I cannot see any principle on which an obligation for the benefit of the owners of the coal on one dip to restore the surface to its natural state of water-tightness can be founded, which would not equally give rise to an obligation to make the underground workings as water-tight as they were before the coal was removed; nor can I see any distinction between the rain water falling on the surface and that which filtered down into the coal seams. Lord *Ormidale* however does make a distinction. He says:

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(1) Law Rep. 3 H. L. 338.

(2) Lord *Cairns.*

> The water was not the natural product of and did not arise *in the Defender's mine*, but was foreign water, so to speak, introduced into his mine *from the surface*, through operations of the Defender, carried on in an unusual, unreasonable, and improper manner (1).

My Lords, the evidence was that the coal at the upper part of the seam could not in any way be removed without breaking the surface in the way in which it was broken, and that this was the usual and proper course of working such coal.

But there was some evidence which led Lord *Ormidale* to the conclusion that, though the Defender was perfectly justified in causing the holes and sits, yet "in not filling up or securing the sits or holes his operations were not usual, reasonable, or proper."

There is no doubt that if a duty was cast on the Defender to fill up or secure these holes and sits he has neglected it.

My Lords, I do not stop to inquire how far the practice of miners could cast an obligation on the owner of the upper mine, which would not otherwise exist, but it is unnecessary to determine anything on this point, as I think your Lordships will agree with me in thinking that the evidence goes no further than to shew that generally the owner of the surface made it matter of bargain for the benefit of the surface that when mines are worked out the surface should be restored. Where such a stipulation exists the owner or occupier of the surface has a right to complain if it be not restored, but that gives no claim to any one else. And in the present case the owner of the surface preferred that it should remain unrestored.

I for these reasons am of opinion that the judgment complained of should be affirmed, and that the appeal should be dismissed with costs.

THE LORD CHANCELLOR (2):—

My Lords, at the close of the argument of the Appellants in this case, your Lordships intimated that you would consider whether you would desire to hear the Respondents. The result of that consideration has been that there is no doubt in the mind of any of your Lordships as to the course which should be taken with regard to this appeal. I have had the advantage of considering the observations which have just been made by my noble and learned friend; and I have only to say that I entirely agree in the course which he has proposed.

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(1) 4th Series, vol. iii. p. 298, 299.

(2) Lord *Cairns*.

LORD PENZANCE:—

My Lords, I will only say that I entirely concur with the opinions which have been expressed.

LORD GORDON:—

My Lords, I also entirely concur.

Interlocutors complained of affirmed, and appeal dismissed with costs.

Appellant's agent: *W. Robertson.*
Respondent's agents: *Flux & Co.*

[PRIVY COUNCIL.]

J. C.*
1876
Nov. 7.

JOSEPH THÉBERGE AND ANOTHER . . . APPELLANTS;

AND

PHILIPPE LAUDRY . . . . RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC, CANADA.

Quebec Controverted Elections Act, 1875—*Royal Prerogative as to admitting Appeal.*

App Cas
414-8
App Cas
769

The Petitioner having been declared duly elected a member to represent the electoral district of *Montmanier*, in the Legislative Assembly of the Province of *Quebec*, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the *Quebec Controverted Elections Act*, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council:—

Held, that such application must be refused.

Although the prerogative of the Crown cannot be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the above Act and the previous legislation is, that it was the intention of the Legislature, under this Act, which was assented to by the Crown, to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

THIS was a petition by *Philippe Laudry* above-named, for special leave to appeal from a judgment of a majority of the Superior Court for the Province of *Quebec*, *Routhier*, C.J., dissenting, dated the 29th of May, 1876, which found, on a petition presented by the above-named *Joseph Théberge* and another, under the *Quebec Controverted Elections Act*, 1875, that he as a candidate had been guilty of corrupt practices, both by himself and his agents, at an election held in July, 1875, of a member to represent the electoral district of *Montmanier*, in the Legislative Assembly of the province of *Quebec*, declared the seat so obtained by him to be vacant, and condemned him in costs.

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* *Present*:—THE LORD CHANCELLOR (Lord *Cairns*), SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR HENRY KEATING.

This petition submitted that in each of four instances in which the corrupt practices alleged had been held to be proved, two by the candidate himself and two by his agents, the judgment of the majority of the Superior Court was erroneous in law and unsupported in fact, and that the judgment of the Chief Justice was correct; that by the Consolidated Statutes of *Lower Canada*, an appeal lies to the Court of Queen's Bench in all cases where the sum in dispute exceeds the sum of £20 sterling, or relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or to such like matters or things where the rights in future might be bound, although the immediate value or sum in appeal is less than £20 sterling; but that by the *Quebec Controverted Elections Act* (38 Vict. c. 8, *Quebec* Statutes), s. 90, it was provided "that the judgment of the Superior Court in such cases shall not be susceptible of appeal." The petitioner further stated that the Superior Court on the 27th of June, 1876, had rejected his motion for leave to appeal to Her Majesty, but he submitted that the question of law involved in the said four cases, and especially in the two which involved his personal disability, were of the highest and most general importance, while the consequences to himself of the said judgment were most serious.

Mr. *Benjamin*, Q.C. (Mr. *Bompas* with him), for the Petitioner, as to the right of appeal, or the power to grant special leave to appeal, referred to the Act of the Imperial Parliament, 7 & 8 Vict. c. 69, and to *Boston* v. *Lelièvre* (1), to Consolidated Statutes of *Lower Canada*, c. 88, s. 17, and to *Quebec Controverted Elections Act*, 1875, sects. 89 and 90, and the Act of 1872 repealed thereby. Although under sect. 90 of the *Quebec Controverted Elections Act* (38 Vict. c. 8), it is provided that the judgment of the Superior Court under that Act should not be susceptible of appeal, yet such provision is inconsistent with or repugnant to sect. 92 of the *British North America Act*, 1867 (Imperial Parliament, 30 & 31 Vict. c. 3), inasmuch as it is on the proper construction of the Imperial Act *ultra vires* the Provincial Legislature of *Quebec* to take away the right of appeal. When the provincial Legislature deals with the

(1) Law Rep. 3 P. C. 157, 164.

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local tribunals, it says that the Court of Review shall pass the final judgment. But the Crown is nowhere alluded to, and the right of appeal to the Crown on the one hand, and the prerogative of the Crown on the other to grant special leave to appeal to the Privy Council, are not taken away. It is, moreover, expressly provided by the above-mentioned Imperial Act of 1867, which empowers the Colonial Legislatures to legislate, that they shall not interfere with Imperial statutes. [THE LORD CHANCELLOR referred to *Cuvillier* v. *Aylwin* (1).] That case has been subsequently overruled. [THE LORD CHANCELLOR:—It has frequently been referred to, but I am not at all aware that it has been overruled. There is, moreover, a case in 1862, *In re Marois* (2).] But see *Sauvageau* v. *Gauthier* (3).

Again, the Colonial Act provides, first, in reference to the loss of the seat; second, for punishment for corruption: see *Quebec Controverted Elections Act*, 1875, sects. 267, 268. But on referring to *British North America Act,* 1867 (30 & 31 Vict. c. 3), sect. 91, and sect. 84, it appears that the *Quebec* Legislature has no power to pass any provision relating to qualification or disqualification except that bestowed by sect. 84. It is, therefore, *ultra vires* the Provincial Legislature to provide disqualification and other punishment for corrupt practices. The provincial Legislature, in fact, is prohibited from criminal legislation, even in regard to criminal procedure. [THE LORD CHANCELLOR:—The Judge has said nothing about disqualification in his judgment; he leaves the consequences of his judgment to be governed by the Act, which, according to you, is inoperative in that respect, as being *ultra vires* the Legislature.]

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR (Lord *Cairns*):—

The Petitioner in this case states that he was a candidate at an election held in July, 1875, in the Province of *Quebec*, for the office of member to represent the electoral district of *Montmanier* in the Legislative Assembly of the Province, and that he was declared duly elected; but that after the election a petition was presented by certain electors against the return of the Petitioner, alleging that he had been guilty of corrupt practices by himself and his agents, and praying that the seat might be declared vacant, and the Petitioner declared disqualified, in accordance with the provisions of the *Quebec Controverted Elections Act.* He then states that the petition was tried, according to the Act, before the Court, and that the Court pronounced a sentence against the Petitioner declaring the election null and void, and declaring him guilty of corrupt practices, both personally and by his agents. The petition states certain objections which the Petitioner makes to the decision of the Court, and prays that Her Majesty in Council will be graciously pleased to order that the Petitioner shall have special leave to appeal from the judgment of the Superior Court for the Province of *Quebec* of the 29th of May, 1876, that is to say, from the judgment declaring the election of the Petitioner to be null and void.

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(1) 2 Knapp's P. C. Cases, 72.
(2) 15 Moo. P. C. 189.
(3) Law Rep. 5 P. C. 494.

The Act of Parliament in question is the *Quebec Controverted Elections Act* of the year 1875. That Act repealed an Act of the *Quebec* Legislature of the 36th year of Her Majesty's reign, that is, in 1872, which was intituled "An Act to provide for the Decision of Controverted Elections by the Judges, and to make better Provision for the Prevention of Corrupt Practices at Elections." That Act of 1872 appears to have been the Act which, in *Quebec*, transferred to the Court the decision of controverted elections, which before that time was vested in or was retained in its own hands by the Legislative Assembly of the Province. By the force of the two Acts of 1872 and 1875, in *Quebec*, as in this country, the decision of questions of that kind has now become vested in the Supreme Court. The 89th section of the later of these two Acts, the Act of 1875, provides that the Superior Court sitting in review shall determine—first, whether the member whose election or return is complained of has been duly elected or declared elected; second, whether any other person, and who, has been duly elected; third, whether the election was void; and fourth, all other matters arising out of the petition or requiring its determination. Then the 90th section enacts, "Such judgment shall not be susceptible of appeal."

Now, upon that 90th section it is contended on behalf of the Petitioner that it does not take away any prerogative right of the Crown; that the Crown and the prerogative of the Crown are not specially or particularly mentioned; and that the general rule is, that the prerogative of the Crown cannot be taken away except by a specific enactment. It is said that this section may be satisfied by holding that the intention of the Legislature was, that there should be no appeal from a Superior Court to the Court of Queen's Bench in the colony, which was the kind of appeal that existed in civil cases in the colony, and that the prerogative of the Crown is not in any way affected.

Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case. These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court of the colony for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known. Accordingly we find, on looking at the Act of Parliament, that after providing by the 89th section as to the matters which the Superior Court is authorized to determine, the 91st section declares that a certified copy of the judgment shall be transmitted without delay to the Speaker, and another to the prothonotary in the district in which the petition was presented, and then the 118th section provides:—"The Speaker shall, at the earliest practical moment after having received the judgments and reports, adopt all the proceedings necessary for confirming or altering the return of the returning officer, or for the issuing of a new writ for a new election within thirty days, or for otherwise carrying the final judgment into execution, as circumstances may require. He may, for the issuing of such writ of election, address his warrant under hand and seal to the Clerk of the Crown in Chancery." Then the 119th section is :—"The Speaker shall without delay communicate to the Legislative Assembly the judgments and the reports received, and his own proceedings thereon." And the 120th section is:—"When a special report has been received, the Legislative Assembly may make such order in respect of such special report as it may deem proper." The whole scheme, therefore, of the Act of Parliament is that, once the action of the Superior Court takes place, and the decision of the Superior Court arrived at, the machinery is to go on just as it had formerly gone on inside the Legislative Assembly;—writs are to be issued, seats are to be taken, other proceedings are to be had, as would have been the case before the Court was called into operation, and when the Legislative Assembly decided these matters by its own authority.

Stopping there, it would be very difficult to do otherwise than conclude, from the character of these enactments, that the object which the Legislature had in view was to have a decision of the Superior Court, which, once arrived at, should be for all purposes conclusive.

But there is a further consideration which arises upon this Act. If the judgment of the Superior Court should not be conclusive, of course the argument is that the power which is to be brought to bear to review the judgment is the power of the Crown in Council.

Now, the subject matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously

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maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place.

These are considerations which lead their Lordships not in any way to infringe, which they would be far from doing, upon the general principle that the prerogative of the Crown, once established, cannot be taken away, except by express words; but to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the Legislature under this Act,—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party,—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

In the opinion, therefore, of their Lordships, there is not in this case, adverting to the peculiar character of the enactment, the prerogative right to admit an appeal, and therefore the petition must be refused.

It is, of course, in this view of the case, unnecessary to consider

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whether, if there had been a right to admit an appeal, it would have been a case in which, in the discretion of this tribunal, an appeal should be admitted. On that point their Lordships have never entertained any shadow of doubt. They clearly are of opinion that, even if there was the power of admitting an appeal, this is not a case in which an appeal ought to be admitted; but, in their opinion, it is not a case in which it was ever contemplated or intended that there should be a power to admit an appeal on the part of the Legislature.

Their Lordships were in one part of Mr. *Benjamin's* argument pressed with another matter, that even if an appeal should not be here admitted generally, yet that there was in the finding of the Judge a subordinate part, which ought to be brought by way of review before this tribunal. Mr. *Benjamin* said that the Judge had found that the petitioner was personally guilty of corrupt practices; and then he said that the *Quebec Election Act*, by a particular section, the 267th, provided that if it is proved before the Court that corrupt practices have been committed by or with the actual knowledge or consent of any candidate, not only the election shall be void, but the candidate shall, during the seven years next after the date of such decision, be incapable of being elected to and of sitting in the Legislative Assembly, of voting at any election of a member of the House, or holding an office in the nomination of the Council of the Lieutenant Governor of the Province. Mr. *Benjamin* contended that the Act of Parliament, so far as it engrafted on the decision of the Judge this declaration of incapacity, was *ultra vires* the power of the Legislature of the Province. Upon that point their Lordships do not think it necessary to express any opinion whatever. If the Act of Parliament was in this respect, as contended, *ultra vires* the Provincial Legislature, the only result will be that the consequence declared by this section of the Act of Parliament will not enure against and will not affect the petitioner; but it is not a subject which should lead to any different determination with regard to that part of the case.

Upon the whole, their Lordships will humbly advise Her Majesty that this petition be dismissed.

Solicitors for Petitioner: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

J. C.*
1876
Nov. 23; Dec. 6.

THE REGISTRAR OF TITLES . . . . APPELLANT;

AND

ROBERT BRAND PATERSON . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victorian Transfer of Lands Statute—Registration of Purchase from Judgment Debtor—Alias Writ of Fi. Fa.

1 App Cas 397

On the 2nd of January, 1872, *B.*'s transferor presented for registration under the *Transfer of Lands Statute* transfers of certain lands; and on the 21st of the same month *B.* obtained registration of the transfers and the usual certificates of title. More than three months previously, viz., on the 20th of October, 1871, a copy of a writ of *fieri facias* (which had been issued by the Supreme Court in an action against the said transferor) was served on the Appellant under sect. 106 of the said statute, specifying the said lands as "the lands sought to be affected thereby," and was by the Appellant duly entered. On the 5th of January, 1872, a copy of an *alias fieri facias* in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the Appellant.

On the 2nd and 28th of March, 1872, transfers of the same lands from the district sheriff to the Respondent under the *alias* writ were lodged for registration with the Appellant, who refused to register them or to issue certificates of title:—

Held, on petition by the Respondent under sect. 135 of the said statute, that the Appellant was right in such refusal. *B.* had previously to the 5th of January, 1872, acquired a title to the lands which could only be defeated by a sheriff's transfer of them in pursuance of the original writ; and as the Respondent's transfers were in pursuance of the *alias* writ, and were made at a time when according to the statute no valid transfer could have been made in execution of the original writ, the Appellant was right in completing *B.*'s title by registration on the 21st of January.

THIS was an appeal from three Rules or Orders of the Supreme Court of the Colony of *Victoria*, made respectively on the 2nd of September, 1872, the 3rd of April, 1873, and the 19th of September, 1874, by the first of which it was ordered that the Registrar of Titles should register certain transfers of land to the Respondent in accordance with the 106th section of the *Transfer of Lands*

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

Statute; by the second of which it was ordered that the Registrar of Titles should call in the certificates of title to one *William Baylis,* and should issue to the Respondent clean certificates of title to the said land under the provisions of the said statute; and by the last of which it was ordered that the Registrar of Titles should register the Respondent as proprietor of the land, and issue to the Respondent clean certificates of title under the provisions of the said statute in respect of the said land.

The facts of the case and the proceedings of the Court below are sufficiently stated in the judgment of their Lordships.

Mr. *Cotton,* Q.C., and Mr. *Fitzjames Stephen,* Q.C. (Mr. *J. D. Wood* with them), for the Appellant:—

The main question raised by this appeal is whether in the case where a copy of a writ of *fieri facias* against a registered proprietor of land, accompanied by a statement specifying the land as that sought to be affected by such writ, has been served on the Registrar of Titles, and no transfer upon a sale under such *fieri facias* has been left for entry upon the register within three months from the day on which the copy was served, but a copy of an *alias fieri facias,* accompanied by such statement as aforesaid, has been served on the Registrar before the expiration of three months from the service of the copy of the original *fieri facias,* the Registrar may, after the expiration of such three months, register a transfer of land from the registered proprietor to a purchaser from him, which had been lodged for registration before the service of the copy of the *alias fieri facias,* and may grant a certificate of title to such purchaser. The answer to it depends upon the construction of the 106th section of the *Transfer of Lands Statute* (Act No. 301), which is as follows:—

No execution registered prior to or after the commencement of this Act shall bind, charge, or affect any land, or any lease, mortgage, or charge; but the Registrar, on being served with a copy of any writ of *fieri facias* issued out of the Supreme Court, or of any decree or order of such Court, accompanied by a statement signed by any party interested, or his attorney, solicitor, or agent, specifying the land, lease, mortgage, or charge sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the register book; and after any land, lease, mortgage or charge so specified shall have been sold under any such writ, decree, or order, the Registrar shall, on receiving a transfer thereof, in such one of the forms in the 15th schedule thereto as the case requires (which transfer shall have the same effect as if made by the proprietor), enter such transfer in the register book, and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor of such land, lease, mortgage, or charge: Provided always, that until such service as aforesaid, no sale or transfer under any such writ shall be valid as against a purchaser for valuable consideration, notwithstanding such writ was actually lodged for execution at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the lodgment of such writ. Upon production to the Commissioner of sufficient evidence of the satisfaction of any writ a copy whereof shall have been served as aforesaid, he shall direct an entry to be made in the register book of a memorandum to that effect, and on such entry such writ shall be deemed to be satisfied. Every such writ shall cease to bind, charge, or affect any land, lease, mortgage, or charge specified as aforesaid, unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day on which the copy was served."

It is to be observed that real estate in *Victoria* has always been liable to be sold under an execution, at first by the 4th section of 54 Geo. 3, c. 15 (repealed by the *Common Law Procedure Statute*, 1865, sect. 2, and 1st schedule, 1 Victorian Statutes, pp. 94 and 195), and at present by the 137th section of the *Real Property Statute*, 1864 (3 Victorian Statutes, pp. 469 and 470), which enacts "that houses, lands, and other hereditaments and real estates in *Victoria* . . . . shall be subject to the like remedies, proceedings, and process in any Court of Law or Equity in *Victoria*, for seizing, extending, selling, or disposing of any such houses, lands, and other hereditaments and real estates towards the satisfaction of debts, duties, and demands, and in like manner as personal estates in the said colony are seized, extended, sold, or disposed of for the satisfaction of debts."

The transfers to *Baylis* were registered after the expiration of

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three months from the lodging of the original *fi. fa*; and at that time the writ served on the 20th of October had ceased to bind the lands. They were registered as from the time at which they were produced for that purpose—that is, from the 2nd of January, 1872. See sect. 37 of the *Transfer of Land Statute.* Till the expiration of the three months the title was defeasible. [SIR J. W. COLVILE:—The only question is, whether the *alias* writ is not a renewal of the term of three months.] The Respondent was refused registration according to the stated grounds of refusal, first, because his transfer being on a sale under the writ served on the 20th of October, it was not left for entry upon the register within three months; and accordingly, the writs had ceased to bind, charge, or affect the land (see sects. 3 and 106); and secondly, because if such were not the correct view of the law, he should be left to any other remedy which he might have under sect. 146 or otherwise. The Chief Justice held these reasons to be insufficient. It is contended that the registration was right, and that the judgment creditor was not entitled to issue a writ of *alias fieri facias* so as to defeat a prior assignment for value to *Baylis,* which had previously been lodged for registration. An attempt to keep alive the same creditor's right by a succession of *alias* writs is contrary to the policy of the Act. Here the sale took place under an *alias* writ which was issued after the transfer to *Baylis* had been lodged for registration.

Further, assuming that the Registrar ought not to have registered the transfer and granted a certificate of title to *Baylis,* still as he has in fact done so *bonâ fide,* conceiving that he was required by law so to do, it is submitted that the Supreme Court had no power to order him, while such certificates remained uncancelled, to issue certificates of title to the same land to the Respondent. See sect. 47 of the *Transfer of Lands Statute.* It is, moreover, contrary to the whole scope and policy of the statute that there should be two persons (not joint owners) holders of certificates of title to the same parcel of land, and according to the true construction of the statute, the Supreme Court had no power to direct the Registrar to issue to the Respondent certificates of title to the land in question, while another person, claiming by title adverse to that of the Respondent, held certificates of title to the same land. For statutes regulating the procedure of the Courts, see 19 Vict., No. 13, c. 6, and the *Common Law Procedure Act*, 1865, being 28 Vict., No. 274.

The Respondent did not appear.

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The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal by the Registrar of Titles in the colony of *Victoria* against three orders of the Supreme Court of that colony, dated respectively the 2nd of September, 1873; the 3rd of April, 1873; and the 19th of September, 1874. The determination of it turns chiefly upon the construction to be put upon certain clauses of an Act passed by the Colonial Legislature in June, 1866, and known as the *Transfer of Lands Statute.*

The circumstances under which the orders in question have been made are the following:—

In October, 1871, *John Mulholland* was the registered proprietor of certain lands. On the 20th of that month a copy of a writ of *fieri facias,* which had been issued in an action against him in the Supreme Court, at the suit of *William Mainfold Aitken,* was served on the Registrar of Titles, in conformity with the 106th section of the *Transfer of Lands Statute,* specifying those lands as "the lands sought to be affected thereby." The usual entry was thereupon made in the register book.

On the 2nd of January, 1872, *Mulholland* presented for registration transfers of the same lands from himself to one *William Baylis,* in consideration of £632 paid to him by *Baylis.*

On the 5th of that month a copy of an *alias fieri facias* in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the Registrar of Titles.

On the 21st of that month, and therefore after the expiration of three months from the date at which the copy of the first writ was served on the Registrar of Titles, that officer registered the transfers from *Mulholland* to *Baylis,* and issued to the latter the usual certificates of title.

On the 2nd and 28th of March, 1872, transfers of the same lands from the district sheriff to the Respondent under the *alias* writ were lodged for registration with the Registrar; but he refused to register them, or to issue certificates of title to the Respondent as the proprietor. The consideration for these transfers is said to have been only £8. The Respondent, therefore, if really a purchaser, and not a mere agent of the judgment creditor, seems to have known that he was buying a very questionable title.

Upon this the Respondent, proceeding under the 135th section of the statute, required the Registrar to set forth in writing the grounds of his refusal; and afterwards took out a summons in the Supreme Court, calling upon him to substantiate and uphold those grounds. The matter of this application was determined by Chief Justice *Stawell* on the 2nd of September, 1872, when the first of the orders under appeal was made. By that order the Registrar was directed forthwith to enter in the register a copy of this *alias* writ of *fieri facias*, unless the same had already been entered; and also forthwith to register the transfers to the Respondent, in accordance with the 106th section of the statute.

This order having been made upon him, the Registrar tendered to the Respondent certificates of title, qualified by a note in these terms:—"This certificate is issued to Mr. *Robert Paterson*, the transferee, from the district sheriff, under the circumstances appearing in *In re Robert Brand Paterson*, reported 3 *Australian Jurist*, pp. 52 and 54; and in pursuance of the decision of the Supreme Court in that case." The Respondent refused to accept certificates of title in that form; and required the Registrar to proceed against *Baylis* under the 132nd section, in order to compel him to deliver up, for the purpose of being cancelled, the certificates of title issued to him; and on the Registrar's refusal to do so, took out another summons in the Supreme Court against him, calling upon him to appear and substantiate and uphold the grounds of such refusal. That summons was disposed of on the 3rd of April, 1873, by the second of the orders under appeal, which directed the Registrar of Titles forthwith to call in the certificates of title to *Baylis*, and to issue to the Respondent clean certificates of title to the same land.

In obedience to this order the Registrar took out a summons in

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the Supreme Court, under the 132nd section of the statute, against *Baylis*, and one *Smith*, who had acquired from *Baylis* a charge upon the lands and was in possession of the certificates issued to *Baylis*, calling upon them to shew cause why those certificates should not be delivered up for the purpose of being cancelled. This summons was ultimately dismissed by the Court on the grounds that *Smith* had a valid charge on the land, and that so long as that subsisted the Court had no power to comply with the summons. It may be observed that the 145th section of the statute contains a strong provision in favour of purchasers for value, and apparently governed the decision of the Court on this occasion.

The parties being thus at a dead-lock,—one order requiring the Registrar to do that which the Court, on dismissing the last-mentioned summons, had in substance declared he was at present incompetent to do, the Respondent took out a third summons calling upon the Registrar of Titles to substantiate and uphold the grounds on which he had refused to register the Respondent as proprietor of the land, and to issue to him clean certificates of title in respect of it.

The Court, on the 19th of September, 1874, made an order upon this summons directing the Registrar to do what he had refused to do; and this is the third of the orders under appeal.

It is, however, to be observed that the learned Judges who made this last order, did so only because they felt themselves bound by the former orders against which there had been no appeal. Neither of them seems to have been satisfied that those orders were correct; and Mr. Justice *Fellows* expressed an opinion that the Court has been wrong throughout. An appeal to Her Majesty in Council against the last order was allowed in the colony; the Appellant subsequently obtained here special leave to appeal against the first two orders, and thus the whole matter is now open on appeal before their Lordships.

The first question to be determined is obviously the correctness of the order of the 2nd of September, 1872.

The general object and intention of the *Transfer of Lands Statute* are to simplify titles to land by making them depend wholly upon registration, and the certificate of title issued in con-

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formity with the register book. Its provisions deal with transfers of land, whether by the voluntary act of the proprietor, or under an execution issued against him. The material provisions relating to this first class of transfer are the 37th, 42nd, and the 47th sections.

The last of these makes the certificate conclusive evidence that the person to whom it is issued is the proprietor of the land; the second provides that the land shall not pass from one proprietor to another by virtue of an unregistered contract, but only upon registration; and the first provides that every instrument presented for registration shall be registered in the order of, and as from the time at which the same is produced for that purpose. The time, therefore, at which an instrument is presented for registration is very material. It is the duty of the Registrar to register it as from that time. On such registration the land passes; and the purchaser is entitled to the certificate which is to be the conclusive evidence of his title.

The second class of transfer is dealt with by the 106th section. This provides that no mere registration of an execution shall bind or charge the land; but that the Registrar, on being served with a copy of the writ of *fieri facias*, accompanied by a statement specifying the land sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the register book; and after the sale of the land under such writ, shall, on receiving a transfer thereof, enter such transfer in the register book; whereupon the purchaser shall become the transferee, and be deemed the proprietor of the land. It further provides that until such service as aforesaid no sale or transfer under the writ shall be valid as against a purchaser for value notwithstanding the writ was actually lodged for execution at the time of the purchase, and the purchaser had actual or constructive notice of the lodgment of such writ.

And then, after dealing with the case in which the writ may have been satisfied, it expressly provides that every such writ shall cease to bind, charge, or affect the land "unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day on which the copy was served."

The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land; and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby.

Again, there is nothing in the statute, or in this particular section of it, to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the section gives to an execution creditor, or to a possible purchaser through the sheriff.

Such a contract, no doubt, can only be perfected by registration, and must, therefore, remain defeasible until the writ is withdrawn, or satisfied, or the term of three months from the day on which the copy was served, has expired.

In the present case, therefore, the title of *Baylis* to the lands was clear, unless it can be shewn to have been overridden by that of the Respondent claiming as transferee not under the original, but under the *alias* writ of *fieri facias.*

The Chief Justice, in giving judgment on the first summons, said: "The Registrar reads the words 'any writ' as meaning the original writ. There is nothing to justify such a conclusion. 'Any writ,' for obvious reasons, unless limited by the context, refers to an *alias* or *pluries* writ, just as much as to the original writ." It is not necessary to the Appellant's case to contest this general proposition. Let it be assumed that an *alias* writ is duly issued in order to affect land not previously affected by the execution, such writ would, of course, have the same operation as an original writ would have had. But it would have no more. It would affect the land for three months from the date of the service of a copy of it upon the Registrar; but a transferee under it would take subject to rights acquired before such service. Nor, though it would have this operation, could it, in their Lordships' opinion, have the further effect of enlarging, contrary to the plain policy of the Statute, the operation of the original writ.

In the present case it is not shewn, nor is it easy to see, how

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the *alias* writ came to be issued. The *Common Law Procedure Act* for the colony (28 Vict. No. 274) seems to contain no special provisions touching the issue of *alias* writs of execution. It may, therefore, be presumed that an *alias* writ of *fieri facias* could only be regularly issued in the colony under the circumstances in which it might be issued in this country; or, at all events, when such a proceeding might be necessary in order to reach property which had not been reached, and could not be reached by the original writ. In the present case the land in question had been reached by the original writ; nor is there any reason to suppose that when the *alias* writ issued, the original writ was not still in force. The 292nd section of the *Common Law Procedure Act* provides that every writ of *fieri facias* may be in the form contained in the 26th schedule to the Act; and according to that form the writ would be returnable "immediately after the execution thereof." The section, indeed, goes on to say that all writs of execution may be made returnable on a day certain, or may be returnable after the execution thereof. But there is nothing here to shew that in this case the original writ had expired before the 5th of January, 1872; and the act of the Registrar in delaying the registration of the transfers to *Baylis* until the 21st affords a strong inference that the original writ was in force up to that date.

Therefore, whether the *alias* writ was or was not properly issued (a question upon which their Lordships offer no opinion) it seems clear that the service upon the Registrar of a copy of it in order to affect lands already affected by the original writ, can be accounted for only by supposing that the object of the party making the service was the unwarrantable one of attempting to enlarge the statutable term of three months within which, in order to enforce his execution against the lands, he was bound to procure the sale of them.

Again, their Lordships are of opinion that upon the true construction of those provisions of the statute (which have already been referred to and considered) *Baylis* had, on the 5th of January, 1872, acquired a title to the lands, which could only be defeated by a sheriff's transfer of them in pursuance of the original writ. The transfers to the Respondent were, *ex concessis*, in pursuance of the *alias* writ, and were made at a time when, according to the statute, no valid transfer could have been made in execution of the original writ. If this be so, the Registrar was right in completing *Baylis*' title by registration on the 21st of January, and in issuing the certificates to him; and was also justified in refusing to register the subsequent transfers to the Respondent. It follows that the first order is erroneous, and ought to be reversed.

This being so, it becomes unnecessary for their Lordships to consider particularly the correctness of the other two orders. They are founded upon the first, and, if that cannot stand, must fall with it. The case has been heard *ex parte*, and their Lordships are, therefore, the more desirous to abstain from expressing any opinion upon the construction of the statute, and upon the reasons given by the learned Judges of the Supreme Court for their various orders, which is not essential to the determination of the present appeal.

They will humbly advise Her Majesty that all the three orders under appeal be reversed, and in lieu thereof that orders be made dismissing the summons of the 29th of June, 1872, with costs; and the summonses of the 12th of March, 1873, and the 29th of August, 1874, without costs. Considering that the subsequent litigation would have been avoided if the Registrar of Titles had appealed against the first order at the proper time, their Lordships have come to the conclusion that the orders of dismissal of the two last summonses should be without costs. They think, however, that the Registrar is entitled to the costs of this appeal.

Solicitors for the Appellant: *Freshfields & Williams.*

[PRIVY COUNCIL.]

ABRAHAM HAMEL AND OTHERS . . . . DEFENDANTS; J. C.* 1876 Nov. 15, 16, 17, 18.

AND

THE HONORABLE LOUIS PANET . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE).

Marriage Contract—Reprise—Wife's Consent to Husband's Hypothecation—Notarial Act—Formalities of Execution.

By the first of two instruments made in 1808, on the marriage of *J. F.* with *J. S.*, the immoveable property in question in this appeal was conveyed by way of donation by *J. S.'s* mother to the said *J. F.* and *J. S.* By the second, *J. F.* and *J. S.* agreed *inter se* that they would live in community; that all immoveable and other property belonging to either of them at the date of the marriage should be brought into community; that it should for the purposes of the community be deemed moveable; with a clause of *reprise*, to the effect that when the community was dissolved by death or otherwise, the wife might at her option reclaim or resume all property brought in on her part clear and free from the debts and charges of the community, subject to this, that in any case in which she had bound herself, or assented, to any particular debt, or had a judgment pronounced against her by a competent Court, she was to rely upon and have the benefit of her husband's estate, and should have as from the date of the marriage a *hypothec* upon her husband's estate for the fulfilment of that contingent obligation.

By a notarial act passed on the 26th of January, 1855, whilst the community still subsisted as to the said immoveable property, the same was hypothecated to the Appellants by the said *J. F.* and *J. S.* as sureties for the debt of their son. The act further contained an express consent by the mother (*J. S.*) to the hypothecation of the said property by her husband in the Appellants' favour, and an express renunciation of any rights, whether of property or hypothec, which she might have had, which could in any way come into competition with the security so created, whether by her own or her husband's act.

In a suit (in 1869) by the Respondent, who claimed under a subsequent act of donation from *J. S.*, to set aside the notarial act, it was contended that the same was fraudulent, that certain informalities of preparation, expression, and execution, deprived it of its probative character, and that otherwise it did not bind the title which the Respondent derived from *J. S.*

The informalities were—1, That pages 7 and 8 of the act appeared to have been written after pages 9 and 10, and had not been initialed; 2. That the house notified as the place where the contract was passed was incorrectly stated:—

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* *Present:*—LORD SELBORNE, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR JAMES HANNEN.

Held, that the act was not fraudulent, was well executed, authentic, and probative, and was sufficient in law to bind the title which the Respondent claimed through the donation of *J. S.*

According to the French law contained in the Ordinance of *Francis* I. of October, 1535, or the Canadian law contained in the Edict of the Council of State of 1733, or the principle upon which these laws are framed, the initialing of the above pages 7 and 8 was not essential, the sense of the deed not being complete, and the deed not being coherent without them.

According to the practice in *Canada*, and possibly according to the right construction of the Ordinance of *Blois*, Art. 167, the house where the notary completes a contract by his signature is the proper place to be notified as the place where such contract was passed. If, however, there is error in notifying the place of passing the contract, the consequence is not nullity, nor that the act loses its notarial and probative character, but only that it must be proved (as was done in this case) that the place where it actually was passed was within the jurisdiction of the notary.

Assuming that *J. S.'s* contract of suretyship was null and ineffectual, and also her hypothecation, so far as it was connected with her invalid obligation of suretyship; yet her consent to her husband's hypothecation, and her waiver of all claims in favour of the Appellants, were binding upon her. The clause of *reprise* did not enable her to resume or reclaim anything as against a creditor in whose favour she had consented to the act of her husband during the community.

David v. *Gagnon* (1) approved.

THIS was an appeal in an action brought on the 15th of October, 1869, by the Respondent to set aside a notarial deed, dated the 26th of January, 1855, whereby certain lands, which were claimed to be at the date of action the property of the Respondent, had been mortgaged to the Appellants, and to have the mortgage declared invalid, and the entry of it in the registry at *Quebec* erased.

This deed was as follows:—

"*Par devant les Notaires publics résidant en la Cité de Quebec, soussignés,—*

"*Fut présent Monsieur Joseph Falardeau, marchand, demeurant en la paroisse de St. Ambroise de la Jeune Lorette, lequel a, par ces présentes, reconnu et confessé devoir bien légitimement à Messieurs Abraham Hamel, Joseph Hamel et Ferdinand Hamel, marchands associés de la cité de Quebec, faisant commerce ensemble à Quebec,*

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(1) 14 Low. Can. Rep. 110.

sous les nom et raison de 'A. Hamel et Frères,' ce acceptant pour eux et en leurs noms Monsieur Abraham Hamel l'un d'eux, à ce présent, la somme de neuf cent trente-neuf livres un chelin et neuf deniers courant, pour effets et marchandises vendus et livrés dès avant l'exécution des présentes, par les dits Sieurs A. Hamel et Frères, au dit Joseph Falardeau, ainsi que ce dernier le reconnaît, et s'en déclare content et satisfait.

" *Laquelle somme de neuf cent trente-neuf livres un chelin et neuf deniers courant le dit Sieur Joseph Falardeau promet et s'oblige rendre et payer aux dits Sieurs A. Hamel et Frères, ou à leur ordre à demande, avec ensemble l'intérêt, à* 6 *pour cent, payable annuellement à compter de ce jour, jusqu'au parfait paiement ; et pour assurer et garantir le paiement de la dite somme de neuf cent trente-neuf livres un chelin et neuf deniers courant, et des intérêts qui pourront devenir dûs sur icelle aux termes ci-dessus mentionnés, le dit débiteur a hypothéqué spécialement" :*—[Here follows a description of six lots of land.]

" *A ce faire est intervenue et était présente Dame Hermine Laveau, épouse du dit Joseph Falardeau, du dit Sieur Falardeau, son époux, à ce présent bien et duement autorisée pour et à l'effet des présentes, laquelle, après avoir pris communication, et que lecture lui a été faite de la présente obligation, qu'elle a dit bien entendre et comprendre, l'a volontairement approuvée, confirmée et ratifiée, voulant qu'elle soit exécutée en tout son contenu selon sa forme et teneur ; et elle consent à décharger, comme par ces présentes elle décharge, les droits et hypothèques qu'elle a et peut avoir sur les immeubles ci-dessus désignés, et spécialement hypothéqués par le dit Sieur Falardeau, son mari, pour assurer le paiement de la dite somme de neuf cent trente-neuf livres un chelin et neuf deniers courant, et des intérêts qui pourront devenir dûs sur icelle, pour quelques raisons que ce soit ou puisse être ; et elle veut et consent que les dits Sieurs A. Hamel et Frères priment sur elle en hypothèque sur les immeubles ci-dessus hypothéqués par le dit Joseph Falardeau, son mari, jusqu'au montant de la dite somme et des intérêts qui pourront devenir dûs sur icelle, ce qui est accepté pour les dits Sieurs A. Hamel et Frères par le dit Sieur Abraham Hamel, l'un d'eux ; la dite Dame Falardeau consentant à renoncer, comme elle renonce par les présentes, à l'exercice d'aucuns droits, soit réel de propriété soit hypothécaires, et tous autres qu'elle*

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aurait droit d'exercer sur les biens du dit Joseph Falardeau, son mari, et sur lesquels elle donne et accorde priorité et rang antérieur à elle aux dits Sieurs A. Hamel et Fréres.

"*A ce faire sont intervenus et étaient présents Sieur Joseph Falardeau père, bourgeois, demeurant en la dite paroisse de St. Ambroise, et Dame Isabelle Savard, son épouse, qu'il autorise bien et duement pour et à l'effet des présentes, lesquels se sont volontairement rendus cautions du dit Sieur Joseph Falardeau, leur fils, envers les dits Sieurs A. Hamel et Frères, et s'obligeant solidairement avec le dit Joseph Falardeau, envers les dits Sieurs A. Hamel et Frères, au paiement de la dite somme de neuf cent trente-neuf livres un chelin et neuf deniers courant, et des intérêts qui pourront devenir dûs sur icelle aux termes ci-dessus mentionnés.*

"*Et pour assurer le paiement de la dite somme de neuf cent trente-neuf livres un chelin et neuf deniers courant, et des intérêts qui pourront devenir dûs, les dits Sieur et Dame Falardeau ont hypothéqué spécialement comme caution*":—[Here follows a description of two lots of land.]

"*Et par ces présentes la dite Dame Falardeau, autorisée de son mari comme susdit, consent à décharger comme elle décharge par ces présentes tous les droits d'hypothèques qu'elle a et peut avoir sur les immeubles ci-dessus dernièrement désignés, pour quelques causes que ce soit ou puisse être; et elle veut et consent que les dits Sieurs A. Hamel et Frères priment sur elle en hypothèque sur les dits immeubles ci-dessus hypothéqués par le dit Joseph Falardeau, son mari, jusqu'au montant de la dite somme de neuf cent trente-neuf livres un chelin et neuf deniers courant, et des intérêts qui pourront devenir dûs sur icelle, ce qui est accepté par le dit Sieur Abraham Hamel, pour les dits Sieurs A. Hamel et Frères; la dite Dame Falardeau consentant à renoncer, comme elle renonce, à l'exercice d'aucuns droits soit réel de propriété soit hypothécaire, et tous autres qu'elle aurait droit d'exercer sur les biens du dit Joseph Falardeau, son mari, sur lesquels elle donne et accorde priorité et rang antérieur à elle aux dits A. Hamel et Frères.*

"*A été expressivement convenu entre les parties, que tous argents ou effets que le dit débiteur pourrait payer et donner aux dits créanciers ci-après ne pourront être imputés sur le montant de la présente* *obligation, tant que le dit débiteur sera endetté envers les dits créanciers, soit pour de nouveaux effets qu'il pourrait acheter ci-après ou autrement, et qu'il existera des comptes contre le débiteur et les créanciers, et que aucun tel paiement ne sera précompté sur le montant de cette obligation qu'après que le dit Sieur Falardeau aura payé tout ce qu'il pourrait devoir ci-après aux dits créanciers; l'intention étant que les créanciers conservent les avantages des présentes, tant qu'il sera endetté envers les dits créanciers, le dit débiteur renonçant au droit d'imputer les paiements qu'il pourrait faire à la dette la plus onéreuse pour lui, et voulant que les dits créanciers exercent ce droit pour lui.*

"*Et pour l'exécution des présentes les parties font élection de domicile en leurs demeures actuelles, auxquels lieux, &c., car ainsi, &c.*

"*Fait et passé en la dite paroisse de St. Ambroise, en la demeure du dit Sieur Joseph Falardeau fils, l'an mil huit cent cinquante-cinq, le vingt-sixième jour de Janvier après midi, sous le numéro huit mille deux cent quatre-vingt-deux; et le dit Sieur Joseph Falardeau fils, et sa dite épouse, et le dit Sieur Abraham Hamel ont signé avec nous dits notaires, les dits Sieur et Dame Joseph Falardeau, cautions ont déclaré ne savoir écrire ni signer de ce requis, lecture faite.*

"*Joseph Falardeau,*
"*Hermine Laveau,*
"*Abm. Hamel.*

"*F. Gamache, N. P.*

"*Jh. Petitclerc, N. P.*

"*Pour copie conforme à la minute dans l'étude de feu Mtre. Jh. Petitclerc, notaire, pour la Province de Quebec, ci-devant Bas Canada, déposée dans les archives de ce District vidimée et collationnée par nous soussignés gardiens d'icelles, et Protonotaire de la Cour Supérieure à Quebec, le vingt-neuvième jour d'Octobre mil cent soixante-neuf.*

"*(Signé)* *Fiset et Burroughs, P. C. S.*

"*(Endossé.)*

"No. 1603. This deed of obligation was entered and registered in the Registry Office for the Registration Division of *Quebec*, at fifteen minutes past nine o'clock, A.M., on the twenty-ninth day of

January, eighteen hundred and fifty-five, as number sixteen hundred and three in Register B, vol. 41, p. 467.

"(*Signé*) *P. M. Montezambert*, Registrar.

"No. 8282. 26 *Janvier*, 1855. *Obligation par Jos. Falardeau fils, à A. Hamel et Frères.*

M. Taschereau	$1 90
"*Certificat d'enregistrement*, 70.35. . .	$2 95."

The circumstances under which the above deed was executed, and the mode of execution and registration of the deed, are fully described in the judgment of their Lordships.

The parties to the deed are also described in the said judgment. Two of such parties, *Falardeau*, senior, and *Josephte*, his wife (formerly *Josephte Savard*), were married in 1808 in community under a contract dated the 10th of August of that year, and registered the 17th of May, 1813, by which their *propres immeubles* (respective real estates) were *ameublis* (converted theoretically into personalty), in order that they might enter into the community. The land comprised in the above notarial act or deed was a *propre immeuble* of *Josephte*, then *ameubli*. And in the same marriage contract was contained a clause of *reprise*, providing that on the dissolution of the community by death or otherwise, the wife or her heirs might renounce it, taking back what she had contributed, without being bound by its debts, and if she should have made herself liable, or had judgment given against her for any such debts, then being indemnified against them by the husband; and for the purpose of recovering such indemnity the husband thereby hypothecated his property from the date of that contract.

The material portions of that contract are as follows:—

"*Seront les futurs époux uns et communs en tous leurs biens meubles et conquêts immeubles, et même dans leurs propres immeubles qu'ils ameublissent par ces présentes, à l'effet de les faire entrer en leur future communauté, dérogeant pour cet objet seulement toutes coutumes et usages à ce contraire.*"

A subsequent clause was as follows:—

"*Arrivant dissolution de la dite future communauté, soit par mort ou autrement, sera loisible à la dite future épouse et aux siens d'accepter* *icelle ou y renoncer; et en cas de renonciation de reprendre franchement et quittement tout ce qu'elle justifiera y avoir apporté, soit par succession, donation, legs, ou autrement, sans être tenue des dettes et charges de la dite future communauté; au cas qu'elle s'y fût obligé, y eût parlé ou y eût été condamné, elle en sera garantie et indemnisée par et sur les biens du dit futur époux qui y sont de ce jour hypothéqués."*

On the 4th of April, 1857, a judgment was pronounced in a suit against *Falardeau*, senior, by his wife, whereby she was declared separate from him in property, with power to renounce the community in conformity with the clause of *reprise.* This she did three days later by a notarial deed. The Appellants had no notice of these proceedings, and were not parties to them.

The declaration in the action out of which this appeal arose set out the substance of the notarial act and its registration, and then alleged that it was false and invalid as far as regarded the alleged guarantee and mortgage of *Joseph Falardeau*, senior, and his wife, that neither *Joseph Falardeau*, senior, nor his wife had ever been parties or consented to the deed or appeared before the notary. It further alleged that the immoveables alleged to have been mortgaged were the property of the wife, *Josephte Savard*, having been given her at the time of her marriage by her mother, *Marie Anne Poitras.* That by her marriage contract, which established a community of all their property between herself and her husband, *Joseph Falardeau*, senior, she had expressly stipulated that she should be free at any time to renounce the community, and that if she renounced it she should receive the whole of her property free from all the debts and charges of the said community. That she had duly renounced the community on the 7th of April, 1857, That, therefore, if *Joseph Falardeau*, senior, and his wife, *Josephte Savard*, did consent to the deed, the latter would still be entitled to the property free from the mortgage.

The declaration further alleged that subsequently, on the 25th of June, 1863, *Josephte Savard*, with the consent of her husband, transferred the property, with the exception of a house occupied by the widow of *Joseph Falardeau*, junior, to the Respondent, the Honourable *Louis Panet*, in consideration, *inter alia*, of an annuity of £20.

The declaration concluded that the said notarial deed should be declared false as far as concerned the guarantee and mortgage of *Joseph Falardeau*, senior, and his wife, and the guarantee and mortgage should be declared illegal and invalid, and that the entry of the mortgage should be erased from the register at *Quebec*.

In addition to the Appellants, *Hermine Laveau*, the widow of *Joseph Falardeau*, junior, and *Edward Glackemeyer*, who represented the succession of *Joseph Falardeau*, junior, who died insolvent, were made parties to the action; but they were merely formal parties, and suffered judgment to go by default.

By Canadian law, a notarial deed can only be set aside by a process called *inscription en faux*, and the Respondent accordingly produced, with his declaration, an authentic copy of the deed, and then filed an *inscription en faux*, and reasons *en faux*, which constituted the commencement of a subsidiary action to try the validity of the deed. The principal and subsidiary actions being for substantially the same object, were, by consent, tried together.

The Defendants, the now Appellants, pleaded in both the principal and subsidiary actions only the general issue.

The case was argued in the Superior Court on the merits on the 1st of March, 1871, before *Meredith*, C.J., and a motion of the Plaintiff for the rejection of certain exhibits, and for the revision of certain decisions at *enquête* on questions of evidence, was heard at the same time.

On the 8th of July, 1871, the Court gave an interlocutory judgment, ordering that it be referred to experts to report to the Court whether the seventh and eighth pages formed a part of the deed as originally executed.

The parties being unable to agree upon experts, the Court, on the 22nd of November, 1871, nominated three experts for the purpose of the said judgment, who, on the 1st of March, 1872, filed an unanimous report that the seventh and eighth pages formed part of the deed as originally executed.

On the 8th of March, 1872, the Respondent moved that the report of the experts should be rejected, and the Appellants that it should be homologated.

On the 7th of May, 1872, the Superior Court gave final judgment homologating the report of the experts, and dismissing the action with costs to the Appellants.

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From this judgment the Respondent appealed to the Court of Queen's Bench for *Lower Canada*, and on the 7th day of December, 1874, the Court (*Dorion*, C.J., *Monk*, *Ramsay*, *Sanborn*, and *McCord*, JJ.,) gave judgment reversing the judgment of the Court below, declaring the guarantee of *Joseph Falardeau*, senior, and his wife, invalid, and ordering the minute of the said mortgage to be erased from the registry at *Quebec; Sanborn* and *McCord*, JJ., dissenting.

Mr. *Benjamin*, Q.C., and Mr. *Bompas*, for the Appellants:—

The deed impugned by the Respondent and set aside by the Court of Queen's Bench, was duly executed and assented to by *Falardeau*, senior, and his wife. It consists of ten pages, the first two and the last two being on an outside sheet, pages 3 to 6 being on a sheet placed within the other; pages 7 and 8 being on a half sheet, also within the other, the leaves being all fastened with a string. The deed, with the exception of pages 3 to 6, is in the handwriting of the notary *Petitclerc;* those pages are in the handwriting of the notary *Gamache*, and appear to have originally formed part of the draft of a different deed, and to have been altered by the notary *Petitclerc* so as to form a part of the deed in question. Pages 7 and 8 appear to have been written at a different time from the rest of the deed; the last lines of page 8 being spaced out so as to fill the page; those pages, however, neither begin with the beginning nor end with the end of a sentence, and read continuously with the preceding and succeeding pages, which without them could not make sense. The guarantee of *Falardeau*, senior, and his wife, which are contained in them, is expressly referred to in the 10th page, immediately before the signatures of the parties. Upon the question of execution, both the Courts below decided in favour of the Appellants, that the deed was assented to by *Falardeau*, senior, and his wife. It was registered immediately after its execution in accordance with the provisions of the *Registration Act.* The main question in the case therefore is whether the deed was valid in law, and what was its effect. Notarial deeds, according to Canadian Law, are authentic and of the nature of English records. It is not necessary to prove the signatures to them, but upon mere production they are conclusive and binding until set aside by a special proceeding called "improbation" or "*inscription en faux*," the burden resting upon the party challenging them to prove their falsity. In all countries which derive their law from the Roman law, there is recognised a species of judgment of executive officers like notaries. The decisions or acts of these notaries are binding and in their nature as valid as the acts of Courts of justice. In consequence of their importance several French ordonnances were passed prescribing the formalities to be observed by notaries in passing their deeds, only a few of which however were declared to be observed under pain of nullity.

Upon the first settlement of *Canada* it appears that many deeds were passed in which these formalities were not observed, and which were not even signed; and two declarations of the French king were accordingly made in 1733: *Edits et Ords.*, vol. i. pp. 536, 539; the first of which in effect validated notarial deeds which had been signed, though wanting in other formalities, and by s. 8 gave power to the *Conseil Supérieur* to validate other deeds if they had been acted on; the second declaration prescribed the formalities to be observed for the future, and imposed heavy penalties on notaries disregarding them, but did not declare that the non-observance of them should render the acts themselves void. [SIR R. P. COLLIER:—Suppose a notarial act not to be authentic by reason of notarial irregularity, may it not nevertheless be proved?] It may be invalid as a notarial act, but if the deed is of a character which does not require to go before a notary it is none the worse because it purports to have done so. The formalities required by the French ordonnances extend to the minutest particulars. The principal of these ordonnances are an ordonnance of July, 1304, clause 3, *Isambert, Recueil d'Anciennes Lois*, vol. ii. p. 818; an ordonnance of March, 1498, cl. 65, *Isambert*, vol. xi. p. 352; of October, 1535, *Isambert*, vol. xii. p. 482. [LORD SELBORNE:—These are very stringent precautions against the possibility of tampering with the document.] See also ordonnance of May, 1579, *Isambert*, xiv. p. 420, sect. 165, and decisions of the Parliament of *Paris* in 1627 and 1685. The new French law is governed by the law of March, 1803, see *Isambert's* Collection of Modern Laws, vol. xiv. p. 38, which shews that a deed may be void as a notarial instrument, yet binding on those who have signed it.

The sole ground on which the majority of the Judges of the Court below held that the act was invalid so far as the sureties were concerned, was that the 7th and 8th pages were not separately initialed, although they had been written separately; and, in the opinion of the majority of the Judges, subsequently to the preparation of the rest of the deed, though not to its signature. There is, however, no law in *Canada* which requires each page or sheet of a notarial document to be signed. At the time the deed was passed the law governing notarial acts was contained in the declaration of *Louis* XV. of 1733 respecting notaries in *Canada, Edits et Ords.*, vol. i. p. 538; Arts. 5 and 6. Pages 7 and 8 of this deed are not an addition or *renvoi*, within the meaning of Article 5. Even if initialing was necessary, its absence was not a ground of nullity; as will be shewn hereafter.

Two of the Judges of the Court below (*Dorion*, C.J., and *Monk*, J.) held the deed also to be void on the ground of three other informalities; 1st, that the notary did not sign the act in the presence of all the parties; 2nd, that he did not know the two sureties, and did not procure witnesses to their identity; and 3rd, that the deed states that it was "*fait et passé en la dite paroisse de S. Ambroise, en la demeure du dit sieur Joseph Falardeau, fils*," whereas the assent of the sureties to the deed was obtained in the house of *Joseph Falardeau*, senior. The act, however, was *fait et passé* where the notary finally signed it; it was unnecessary to put down the house where any and every signature was taken. This is a matter which has been and can be ruled by custom. And on the evidence the practice in *Canada* is to say that an act is passed at the house where it is finally signed by the notary. *Evanturel* v. *Evanturel* (1) shews that this Court will interpret a doubtful statute by constant custom. The question there was whether a will was valid in the absence of some formality prescribed by the 289th Article of the *Coutume de Paris*. The instrument was held substantially to have complied with the statute requirements. Even if the statement as to the house is erroneous,

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that is not ground of nullity. See *Toullier*, vol. viii. Nos. 82, 83, pp. 139, 140; *Parfait Notaire*, vol. i. p. 61, where *Chopin* is cited, who holds that the mention of the *locus* is not necessary for the validity of the act, though safer in order to avoid contestation. See also *Ancien Denisart, vo.* "*Notaire*," p. 436; *Guyot, vo.* "*Notaire*," vol. ii. p. 408. As to whether a *renvoi* should be signed, see *Dalloz, Jurisprudence Générale*, vol. xxxiii., tit. "Obligations," No. 3560, *et seq.* For an express decision of a French Court in reference to a formality prescribed, see *Merlin, Questions de Droit*, tit., "Date," sect. 2; decision of the *Cour de Cassation*, July 17, 1816.

Where nullity is not in words prescribed as the consequence of notarial irregularity, it will not be attached to such irregularity by inference: see *Nouveau Denisart*, tit. "*Acte Notarié*," sect. 8, No. 2, and sect. 7, No. 6; *Ancien Denisart*, tit. "*Acte Notarié*," sect 8, Nos. 1 and 2; Art. 167 of Statute of May, 1579; *Isambert*, vol. xiv. p. 421, repeated in the modern French law, 25th *Ventôse, an* xi. Art. 68 provides the nullity, Art. 12 imposes a particular formality: see *Duranton, Traité des Contrats*, vol. iv. p. 202, *et seq.*

Lastly, with regard to the contention that the deed if valid does not bind the title of the Respondent, it is submitted that a husband can mortgage unconditionally the property of the wife which has been brought into community, although there is a clause in the marriage contract allowing the wife to renounce the community and receive her goods free from the debts and obligations of the community: see *Civil Code of Canada*, sects. 1292, 1393, 1381, and 1400. And under the French authorities the clause above referred to is only binding as between her and her husband, and does not affect third parties: *Pothier, Communauté*, pt. 1, c. ii., No. 410. In all cases of community the husband can sell or mortgage the subject of community—can give away the joint property: see *Renusson, Traité des Propres*, s. 8, No. 26; see also No. 39; *David* v. *Gagnon* (1); *Dalloz*, 1866, pt. 1, p. 276; *Sirey*, 1855, pt. 1, p. 580; 1856, pt. 1, p. 410; 1857, pt. 2, p. 673; *Ferrières, Coutume de Paris*, vol. iii., arts. 207, 211, 225. The renunciation by a married woman of her rights over her real property is valid, though it be for the purpose of assuring a guarantee

(1) 14 Low. Can. Rep. 110.

of her husband. The Canadian statute, 4 Vict. c. 4, s. 36, is relied upon by the other side, but that says nothing about a wife joining her husband as surety for a third person. The husband, it is admitted, cannot induce the wife to become surety for himself: see also *Consolidated Statutes of Lower Canada*, c. 37, s. 55. The husband and wife may bring separate property to the marriage, and then the law creates a mortgage on the husband's property in favour of the wife for whatever is due to her when the marriage is dissolved. Here the parties have agreed to enter marriage under *régime de communauté*. They became, therefore, partners in everything made during the marriage. The wife may at any time put an end to the community by renouncing it, and she may take back everything which she brought to the community free from the joint debts. But if she has mobilized it, and so made it in effect personalty, the husband then has the uncontrolled right to dispose of it, and then she cannot undo any act of his in reference to it, though he remains accountable to her in respect of such act. Under her contract she can renounce her mortgage on her husband's property, and leave him, as regards third persons, full power and disposition: see *Boudria* v. *M'Lean* (1); *Jodoin* v. *Dufresne* (2). The form of the clause giving her a right to renounce the community expressly limits her right to re-take her own property, and cases in which she has not bound herself to the creditors, and the subsequent statute cannot enlarge her rights.

Mr. *Wills*, Q.C., and Mr. *Westlake*, Q.C., for the Respondent:—

Upon the evidence it is established by the Respondent's witnesses that neither *Falardeau*, senior, nor his wife were parties to the deed. Moreover, as the deed, when examined, is found wanting in certain substantial requisites imposed by law on deeds which are to possess notarial authorization, the *onus probandi* in reference to the execution thereof by the parties thereto was shifted upon the Appellants, who failed to discharge themselves of it. As to the burden of proof see *Toullier*, vol. viii. p. 140; as to the value of the evidence given by a party to the suit, see sect. 251 of *Code of Civil Procedure of Lower Canada*.

With respect to those substantial requisites, the condition of the

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(1) 6 Low. Can. Jur. 65.

(2) 3 Low. Can. Rep. 189.

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impugned deed may be thus described from the undisputed testimony, and also from the *procès-verbal* of the Deputy Prothonotary of the Superior Court. It is written on two sheets of paper, one placed inside the other, and a half sheet or single leaf placed between the second leaves of the respective entire sheets, its insertion not being verified by initials or marks of reference. The half-sheet, therefore, furnishes the 7th and 8th pages out of ten in all. It is not cleared up in what way that half-sheet became attached to the deed. From its physical condition it appears to have been written at a different time from that when the alterations were made by the notary *Petitclerc* in the inner sheet written by *Gamache,* and the outer sheet was so written as to be adapted to the inner sheet so altered. The objections which arise on the face of the deed and were allowed by the majority of the Court below are that pages 7 and 8 are an insertion not necessary to the sense of the principal obligation, and not verified by initials or marks of reference, and that they were obviously not written *d'un seul et même contexte* with the rest of the deed. It ought at least to have been shewn by the proper mode of authentication that pages 7 and 8 formed part of the deed at the date of execution (if any) thereof. Even if that could be shewn by extrinsic evidence, the pages did not the less require notarial verification as an addition because they happened to be in the deed before signature by the notary and the parties: *Savère* v. *Savère* in *Dalloz, Recueil,* 1851, pt. 2, p. 84; 1831, pt. 2, p. 230; *Dalloz, Dict. de Jurisprudence,* vol. iv. p. 10, Nos. 252, 259; *Toullier,* vol. viii. p. 238; *Bonnier, Traité de Preuves,* p. 450; *Rolland de Villargues, vo.* "*Acte Notarié,*" Nos. 249 and 251, *vo.* "*Addition,*" *vo.* "*Renvoi,*" *vo.* "*Intercalation,*" *vo.* "*Interligne;*" *Isambert,* vol. xii. p. 483. As to other irregularities, *e.g.,* erasures, see *Duranton,* vol. xiii. p. 47. Further, *Petitclerc* did not know the persons who executed the deed to be *Falardeau,* senior, and his wife. See Ordonnance of March, 1498, Article 65, in *Isambert,* vol. xi. p. 352, which prohibits notaries from receiving such a deed unless the parties are known to them, or are certified by credible witnesses. See as to certifying by witnesses, *Dalloz,* vol. xxxii. p. 579, *vo.* "*Acte Notarié,*" and p. 576; *Dalloz,* vol. xxxiii., arts. 3311, 3315, 3333.

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It is also said that the notary must sign in the presence of the parties: see Canadian edict of 1733, Art. 5 (*Edits et Ord.* vol. i., pp. 539, 540).

Then what are the consequences if any one of these formalities is of the essence of the transaction, and is omitted? There is no sufficient proof *aliunde* of execution—proof of the consent of the parties is not sufficient in the case of a conveyance of real property. If it requires notarial execution, none other can be substituted. The French law requires the Courts to pronounce nullity in other cases besides those of *nullité de plein droit*, which indeed do not need to be pronounced by judgment, and are when the edicts which prohibit the irregularity in question do so on pain of nullity. That occurs in only two instances, viz. article 5 of the Ordonnance of 1535, c. 19, and article 165 of the Ordonnance of *Blois* of 1579. But in the recital of the Ordonnance of 1733 the law of nullity goes much further. And see *Solon, Traité sur la Nullité*, vol. i. p. 227: "*Toutes les injonctions, les défenses, formalités, ou conditions qui tiennent à la substance d'un acte ou d'une convention, sont faites ou prescrites à peine de nullité, bien que le législateur n'ait point formellement prononcé cette peine.*" As to the meaning of *nullité* under the old law, see *Ancien Denisart, vo.* "*Nullité*"; *Nouveau Denisart*, "*Acte Notarié*," sect. 8.

As to the effect of the deed if valid, it is submitted that the Appellants cannot benefit by any hypothecation made by *Josephte*. Originally as the law stood before 1841, she could, with her husband's authority, have bound both herself personally and the property in dispute for her son's debts as purported by the deed in dispute. But she lost such power by the Canadian Act (4 Vict. c. 30, s. 36), which runs thus: "No married woman shall become surety, or incur any liability otherwise than as *commune en biens* with her husband, for debts or obligations entered into by her husband before their marriage, or which may be entered into by her husband during their marriage, and all suretyships by any married woman in violation of this enactment shall be absolutely null." As regards the distinction drawn on the other side, that the suretyship in this case being by the wife with her husband for the debts of a third party, was not within the above section: see

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Jodoin v. *Dufresne* (1). That construction has been sanctioned by the *Civil Code of Canada*, in which the words *avec son mari* are inserted in Articles 1301, 1374, and 1382. Compare *Code Napoléon*, sect. 1494. The deed contains a contract of suretyship and a renunciation of hypothecatory rights, which latter is void on the same principles as apply to the contract of suretyship. The general principle is that a wife cannot incur any liability during the community which will attach to herself personally, or which will impair her rights after the dissolution of the community. Alienation by the wife is not struck at by the clause above cited from 4 Vict., suretyship is: see *Boudria* v. *McLean* (2). The same principles which would validate an alienation would not include hypothecation in their effect, according to any of the French writers, for hypothecation is not made like a mortgage by a conveyance, and is never treated as a partial alienation.

Then the effect of the husband's hypothecation, independent of any effective assistance from the wife, would be determined by the clause of *reprise* in his marriage contract, according to which, unless overridden by authority, the creditors having had notice of it, *Josephte* on renouncing the community would take back the land in question free from her husband's hypothecation.

As to the effect of the clause of *reprise*, the other side cited *Pothier*, *Communauté*, pt. i. c. ii. No. 410, to shew that the husband's power over the joint property was unrestricted; but see pendent to the passage cited, which shews that he was discussing what the law ought to have been rather than what it was. *Josephte's* rights under the clause of *reprise* are secured by contract and legal hypothecation, and override everything else—the husband's power as head of the community is subject to it. [LORD SELBORNE refers to *David* v. *Gagnon* (3).] That case has gone too far, and is against the authorities: see *Toullier*, vol. xiii. p. 473, citing *Pothier*. The older authorities are *Bourjon, Droit Commun de la France*, vol. i. c. ii. s. i. dist. 1, §§ 3, 15, 44, 46, 48, *et seq.*; *Renusson, Traité des Propres*, s. viii. Nos. 26, 39; *Dalloz, Rép. de Jurisp.* *vo.* "*Contrat de Mariage*," No. 2847; *Troplong, Contrat de Ma-*

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(1) 3 Low. Can. Rep. 189.

(2) 6 Low. Can. Jur. 65.

(3) 14 Low. Can. Rep. 110.

riage, Nos. 1810, 1815, 1827, 1828, 2100, 2101, 2102; *Ibid.* (*Priv. et Hyp.*), Nos. 465, 466, 474, 480, and 888.

The counsel for the Appellants were not called on to reply.

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The judgment of their Lordships was delivered by

LORD SELBORNE:—

This is a suit instituted in 1869 to set aside a notarial act which purports to have been passed on the 26th of January, 1855. The Judges in *Canada* have been very much divided in opinion upon the case; three of them in the whole, counting the Chief Justice who sat in the Superior Court which decided for the present Appellants, being against the suit, and three of them, constituting a majority in the Court of Appeal, in favour of the Plaintiff. The original judgment, therefore, which was against the Plaintiff, was reversed, and the appeal is from that judgment of reversal.

The nature of the notarial act and the parties to it are as follows. It appears that a person of the name of *Joseph Falardeau* the younger was and had been for some years before in business at or near *Quebec*. Both his parents were living; his father was of the same name, and he was himself married. He had property, as it would appear, in community, and so had his parents, immoveable property, in the province of *Lower Canada*. He owed at that time a sum of £939 odd to the Appellants, who are a firm carrying on business in the colony, and I suppose we may infer that, being pressed for payment, he offered them the security which is contained in this notarial act; that is to say, he offered the security which that notarial act was intended to perfect. On the face of the act, he and his wife, his father and mother, are all parties to it. Its operation, as far as the son, the debtor, and his wife are concerned, is not now in question. It is an obligation for the payment of the debt, accompanied by a hypothecation of certain immoveable property belonging to the son, in community, as their Lordships infer. So far as the parents are concerned, it purports to create suretyship on their part for the debt of the son, and its interest, and to hypothecate for that purpose certain specified items

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of immoveable property which were in community as between the parents; and it further contains an express consent by the mother to the hypothecation of that immoveable property by her husband in the Appellant's favour, and an express renunciation of any rights, whether of property or hypothec, which she might have had, which could in any way come into competition with the security so created, whether by her own or her husband's act.

That is the nature of the instrument. It was passed, or purports to have been passed, in the afternoon of the 26th of January, 1855, by a notary named *Petitclerc*, in the parish of *St. Ambroise*, and, as it is expressed, at the house of the son; the parish of *St. Ambroise* being, as is stated in the papers, about eight miles from *Quebec*. It is countersigned by another notary, *Gamache*, who seems to have been connected in business with *Petitclerc;* and early on the morning of the third day afterwards, the 29th of January, it was duly registered in the proper office of registry, where it has ever since remained on record.

As has been stated, the suit was instituted in 1869, fourteen years afterwards. It was instituted by a notary named *Louis Panet*, a stranger to the transaction, claiming under a subsequent act of donation from the mother. At the time when the suit was instituted, nearly everybody who ever knew anything about the transaction was dead; both the notaries, *Petitclerc* and *Gamache*, were dead; both the parents, *Joseph Falardeau* and his wife, were dead; *Joseph Falardeau* the son, the principal debtor, was also dead; and the only survivors were *Hermine Laveau*, the wife of the debtor, *Joseph Falardeau* the son, and the Appellants, who were the secured creditors.

By the law of *Lower Canada*, a notarial act, *primâ facie* at all events, is probative; that is, proves itself; or, in the language of that law, is "authentic;" and, to support it, no external testimony is necessary; the burden of proof for impeaching such an act rests upon the person impeaching it. The present Respondent, therefore, M. *Panet*, has to satisfy the Court that there is sufficient ground for setting aside this act. He alleges that he has done so in one or other of three ways. In the first place, in his original pleading, he impeached it as substantially fraudulent, alleging that neither *Joseph Falardeau* the father nor his wife ever appeared before the

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notary or acknowledged the act, or were parties to it in any sense, or had it read over to them. Not in his original pleading, but in a later stage of the cause, he superadded to that grave allegation of actual fraud and fabrication, a suggestion that, even if that were not so, there were informalities appearing on the face of the instrument, with reference to the manner in which it was prepared and expressed and passed, which would deprive it of its probative character, and throw upon the mortgagee the burden of making out that it is a good deed by affirmative evidence of his own, which in this case he has not attempted to do. And, thirdly, it was suggested that, failing both those means of attack upon the deed, still, in point of law, it did not bind that title of the wife to the immoveable property in question, which M. *Panet* had derived from her act of donation.

Their Lordships will consider those objections in the order in which they have been stated. First of all, is there any ground made out for impeaching the *bona fides* of the deed, reserving, of course, the questions of form and the questions of law? Their Lordships are most clearly of opinion that there is no ground whatever for doing so. How is it attempted to do this? So far as extrinsic evidence is concerned, it can scarcely be said to be attempted at all. None is produced having a real and proper bearing, or even a tendency in the direction of such proof, except the deposition of *Hermine Laveau*, the widow of the son, the principal debtor; who states, that as to her and her husband it was all perfectly right and straightforward: that the act was executed and passed at her husband's house, but that his parents were not there. They lived within a very short distance, in the same parish; and her statement is, that the notary, M. *Petitclerc*, with her husband and *Abraham Hamel*, one of the creditors, having come in a carriage which they left at the door of the son's house, went with the instrument to the father's house, stayed there some time, and afterwards, on their return, stated that they had seen the father, who had signed the deed, but that the mother was not at home, and therefore it had been signed in her absence. Cross-examined, she says that one reason she has for believing the mother was not at home is, that the mother had told her before that she meant to go and pay a visit. Now if that evidence were true, it involves

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these consequences: in the first place, supposing it be true that the notary was present, either as a party making, or hearing in silence, the statement that they had found the father at home but not the mother, and had taken the father's consent alone, and not the mother's,—if that statement were true, it follows that at that very same place and time the notary immediately proceeded to pass the act, stating directly the contrary upon the face of it; because on the face of it he says, that he saw both the father and the mother; that the deed was read over to them both, and that both of them stated that they could not write or sign. So that this is imputing to the notary a direct and deliberate simultaneous fabrication of a false document containing a false statement on the very point on which he had just told everybody what was the truth. What can be conceived less probable than such a state of things? What can be more contrary to the principle of the law giving credit to notarial acts, than that attention should be paid, after the lapse of fourteen years, to the statement of an interested witness to that effect? The deed was regularly registered within three days afterwards (a Sunday intervening), and the notary, if the facts had been as so alleged, placed upon record an act for which undoubtedly he would have deserved condign punishment. Besides, what could be more irrational than the conduct of all the parties if such a state of things had arisen; because the statement is, not that the father objected to sign, but that he had signed, nor that the mother was unwilling to sign, but that she was not at home, and, as is suggested, not very far off? Is it possible to believe that the creditors would not have taken some steps to get the security which had been promised them instead of being content with something less? Is it possible to believe that the notary would have deliberately committed falsehood and fraud, instead of taking the carriage, which was at the door, and going after the lady, or waiting till she came home, or postponing the completion of the transaction till a time when it was known she would be at home? Their Lordships have no difficulty in saying that, even apart from the fact that Mr. *Abraham Hamel*, whose evidence the Respondent has chosen to take and use in the cause, distinctly denies the truth of this allegation, they could not for a moment give credit to it; and it appears to them that the Respondent has

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not felt that he could rely upon it; for his suggestion has rather been,—not that the notary was guilty of any fraud or falsehood in the matter, not that he stated on the face of the deed what he knew to be untrue,—but that he might himself have been imposed upon, and that persons who were not the parents might, by the fraud of the son, have been presented to him at the parents' house. For that suggestion also their Lordships find no ground whatever. Indeed, there is nothing in the case to account for its being made, except the circumstance, that the mother's christian name is misstated in a somewhat extraordinary manner upon the face of the instrument. That is not, certainly, a thing which would seem probable *à priori*, nor is it in any way satisfactorily explained; but it is impossible, from that and nothing more, as against the credit of a notarial act, to infer personation and fraud, and that a son presented in the house of his parents to the notary persons whom the notary believed to be his parents, but who, in fact, were not so. In truth, this false name, for false it is in the sense of being inaccurate, was a thing as little likely *à priori* to have happened if there had been fraud, as if the transaction were honest; because persons, who must have known what the true name of the lady was, would certainly, in support of any fraudulent purpose, have had every conceivable motive to describe her by her proper rather than by a different name.

There is really no other extrinsic evidence in support of this attack upon the deed. Their Lordships, of course, have not forgotten that it has been attempted to support it by the introduction upon the record of certain statements made, partly on oath in another suit and partly to private persons, members of her family, or friends, by the mother herself, after her husband's death. Those statements, being left on the record, must be taken into consideration; but only for what they are worth. Now, what are they worth? This and this only: That the lady, in a manner which is not evidence as against the Appellant, from time to time stated that which is inconsistent with the notarial act. Which is to be believed? The statements of an interested party, not evidence,—or the notarial act? Their Lordships cannot for a moment hesitate about the answer to be given to that question, even if there were not added on the record other matters tending to

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impeach the credit of those statements and of the lady who made them. Their Lordships regret to find this record loaded, as it is, with collateral and really immaterial issues, arising manifestly out of the original introduction of matter which ought never to have been introduced.

There is also the fact, that in another case, of another mortgage passed by other notaries in favour of other parties, in a transaction with which the present Appellants had nothing whatever to do, with which they are in no way connected, and as to which the evidence was different from the evidence now before their Lordships, the Court of Queen's Bench of *Lower Canada*, as then constituted, also passed a judgment reversing a former judgment of the Superior Court, and set aside that other deed. Now, there again, matter not germane to this litigation has been added to the record, for the purpose of shewing that in that judgment there was a miscarriage of justice. It is not proper for their Lordships to say more upon that subject than this, that they cannot read the matter so added to the record, consisting of a conveyance by the son to his father of immovable property subject to the payment of the very debt which was in question in that cause and certain other debts, and proof of the use of that deed which the father made afterwards to resist the claims of creditors of the son, referring on that occasion to the very instrument the fabrication of which was alleged in the suit of *Panet* v. *Renaud*,—their Lordships cannot read that evidence, especially bearing in mind that *Panet* was the notary who passed the deed and was a party to the use so afterwards made of it, without concurring, as far as on such a collateral matter it is proper for them to express concurrence, in the observations made upon that transaction by Chief Justice *Meredith*. Therefore that also has no bearing in support of the Respondent in the present case. Neither has the statement of Mr. *Stuart*, that when the son first entered into business he advised the parents not to make themselves liable for the son, and afterwards, when the son was dead, found out that they had not acted upon his advice. There is, therefore, except that evidence of *Hermine Laveau*, which has been already sufficiently dealt with, no extrinsic evidence whatever in support of the impeachment of this notarial act.

What intrinsic evidence is there? We have heard at the Bar, repeated and very ably dilated upon, all the objections which are in the record in the report of the experts, and they in substance go to this: First, that the mother's name is improperly stated to be *Isabelle* and not *Josephte.* Upon that point their Lordships see no reason to add anything to what has already been said. Secondly, that upon examination of the document, it appears to be a piece of patchwork put together of various portions, written, as appears from the character of the ink and writing and other circumstances at different periods of time; and particularly, that the portion which contains, not the whole, but the greater part of the contract and acts affecting the parents of the debtor is written on the pages which are numbered 7 and 8, in a manner from which it is inferred that it was written to fit in to what follows at page 9, and that what follows at page 9 had been previously written. There is a passage in the *factum* of the Respondent, which puts concisely and clearly the result of the test which would be applied, if those two pages were supposed to be entirely left out. In that passage, after making some particular observations upon the document, this is said: "Another remark is worthy of attention; the said act would be complete in itself without this half sheet"—that is, the half sheet containing pages 7 and 8—"if you only added five words, that is to say, '*Sieur Abraham Hamel, l'un d'eux,*' on the first line of the ninth page which had been left blank, and left out the following words at the end of the act:—'*les dits sieurs et Dame Joseph Falardeau, cautions, ont déclaré ne savoir ni écrire ni signer de ce requis, lecture faite.*'" So that leaving out words, perhaps as material as any in the deed, which occur at the end of it, and putting in words necessary to be added between the end of the sixth page and the beginning of the next, whatever the next was, you would then have a context which would be rational and coherent without those two pages. But on what conceivable principle, consistent with the law applicable to the matter, and for the moment dealing with substance and not with form, are you at liberty to put in words in one place, and leave them out in another, for the purpose of discrediting a part of the document, which, as it stands, is consistent, coherent, and necessary to its operation, and the simple omission of which would leave the document inconsistent, incoherent, and not operative according to its expressed intention? When attention is called to the peculiarities of the document, these considerations acquire additional force. It does, indeed, at first sight strike one as a very slovenly thing to put together, in the manner which we find here done, sheets written at different times, the first two pages plainly added to the four which follow, which had been prepared for a different purpose before, and which are altered, the alterations being initialed. They were in the handwriting of M. *Gamache* and not of M. *Petitclerc;* M. *Petitclerc* initialed the alterations, and then he evidently afterwards, in order to adapt the beginning of the instrument to the pages in the handwriting of his partner, put in the first page and the second, which are not initialed; he put them in; and so you get down to the end of the sixth page. Now it is hardly probable, if we are to speculate upon the manufacture of this document, that what had been written by M. *Gamache* ended with the word "*dit*," which is the last word at the end of the sixth page, and did not go further; but for some reason or other nothing in the handwriting of M. *Gamache* is adopted, except what carries you to the word "*dit*" at the end of the sixth page; and then come these two pages in the handwriting of M. *Petitclerc*, which carry forward the context quite correctly without any break. They begin with the very words which ought to follow the word "*dit*," and which otherwise would not be found in any part of the instrument; and those words do not fill up, as one of the Judges seems to have thought, the whole of the first line which in other pages in the handwriting of M. *Petitclerc* is left blank, because another word necessary to the context of the second line occurs at the end of that first line also. It is clear that, so far, you have got two parts of the deed written not in the order in which they occur—the first part and the second part—and put together when this particular instrument was brought into existence. It has been strongly argued that the third part, which is contained in the half sheet pages 7 and 8, must have been written after the part which follows; because not only the handwriting and paper seem a little clearer and fresher, but also because the last lines are extended in such a manner as to indicate a wish on the part of the writer to fill up that page without going beyond the precise point to which those last lines take

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you; and which point concludes the whole of the operation of what I may for convenience describe as the suretyship part of the deed, with the exception (a very important exception) of the renunciatory clause by the mother. Well, it does not seem to their Lordships to be at all impossible to suggest theories which might be consistent with that having happened, although this portion of the deed, or some original part corresponding with it which may have been transcribed and fair copied, may have been brought into existence before that which follows. But their Lordships are content to take the argument as it has been offered, and to assume, for the sake of testing the case, that in point of fact the part, or some portion of the part, which appears on the last two pages, had been written before the part which appears upon pages 7 and 8; and that what had been so previously written was adopted for the purpose of this deed, just as the part in M. *Gamache's* handwriting had been. But if that is assumed, this must follow, that the two last pages, though they look (with the exception of certain words filled in upon a space which had been originally left blank on the ninth page) as if they had been all written at the same time and in the same hand, yet in point of fact were not so; and that the two last pages did not become what they are now, and had not the concluding sentence, which now forms part of them, until after it had been determined to adopt the half sheet which is in this way impeached. What possible objection can there be to this? Every part of it is done by the notaries—every sheet is in the handwriting of the one notary or the other—substantially, all is in the handwriting of *Petitclerc,* because he adopts that of *Gamache,* and alters and initials it. The deed is not sensible or consistent with itself, as it stands, without this portion; it is perfectly and entirely sensible and consistent with it. It was the notary's duty to prepare such an instrument as would fulfil his instructions. Why should their Lordships—because he has put together different sheets, written at different times, for reasons which, now that he is dead and everybody else is dead, after the lapse of fourteen years, cannot be explained,—why should their Lordships presume that it was not in that condition when the instrument was signed? Their Lordships entirely agree on that point with the opinion of the experts, not only that they cannot presume any such thing, that

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fraud is not to be presumed, and least of all against notaries,—but further, that the internal evidence of the document is the other way. If you omit those words, you have not a continuous context. The deed as it ends (and it must have ended as it does now, before the signatures were affixed) would have nothing for the conclusion to apply to; and the 6th page would not be properly connected with that which would follow. If it be necessary to go further, it is not difficult to suggest a theory much more probable than that of the Respondent, which might account for the order having been followed which has been suggested in the preparation of this part of the deed, supposing the suggestion of that order to be correct. The 9th and 10th pages (except the concluding sentence), evidently contain what may be described as a common form. In one part, indeed, of the 9th page, a blank was left to be filled with matter which, perhaps, is not in a common form, namely, that if payments are made on general account they are not to be ascribed to the extinction of this particular mortgage, unless expressly made for that purpose, or something to that effect. At that place a blank was left, which has been so filled up, and no question arises upon it. But with that exception, if it be one, all the matter contained in pages 9 and 10, down to the last sentence, seems to be in the common form and style of such transactions. But the matter contained in pages 7 and 8 is not so; because, in addition to such portions of it as are in common form and style, it contains the names of the sureties and the description of the property which was to be hypothecated,—facts, the correct information as to which must necessarily have been obtained, not from any precedents in the notary's possession, but from the parties themselves. It may well be that the deed, having been prepared intentionally in an imperfect state,—that is, certain parts of it written out to be afterwards completed by the addition of what was necessary to make up the full context,—this portion was reserved until the proper information had been obtained as to the description of the property; perhaps, also, as to the names of the parties. And this agrees with the account given by the Appellant, *Abraham Hamel*, as to what was actually done at the house of *Joseph Falardeau* the elder. But supposing that happened, why should it not be so? What is there wrong, or indicative of fabrication or forgery, in such an order of the preparation or transcription of the different parts of the intended instrument necessary to bring it into existence, and to make it an instrument at all, as any considerations which occurred to the notary might make convenient? Their Lordships, still dealing with this as a question of substance, are most clearly of opinion that there is nothing whatever in these objections.

That brings them to the questions of form; and the first point of form is connected immediately with this last topic, as to the condition of the deed and the two pages 7 and 8 which are supposed—and for this purpose their Lordships assume that the grounds are sufficient for so supposing—to have been written after the writing of all or part of what is on pages 9 and 10. Is there any law which deprives the act of its authentic and probative character because those pages are not initialed? Their Lordships are unable to discover any such law. The French law contained in the Ordinance of *Francis* I., of October, 1535, to which Mr. *Westlake* referred, says that in instruments, which their Lordships assume to include such an instrument as this, there shall be no blank left; everything shall be in writing *d'un datille.* The learned counsel have asked us to infer that that means the same thing as the expression *d'un seule contexte* which occurs in a recent French law; but their Lordships are not satisfied that the commentaries on the recent French law, or the text of that law, were intended to be interpretative of the word "*datille*" in the Ordinance of *Francis* I.; and unfortunately neither the counsel nor any dictionaries which their Lordships have been able to refer to have supplied the required information on that point. Well, at all events, it says it is to be written *d'un datille* without making any *apostille* in the margin or the text, or any interlineation, or leaving any blank; and if there be any such thing as that which ought not to be, that is to say, an *apostille,* interlineation, or blank, it must be repaired and set right at the end of the note; in fact, it should be initialed or verified by some form of certificate on the part of the notary. Well, as far as that law is concerned, if we inquire whether there is anything here to which it requires the notary's initials or certificate to be applied, their Lordships say they find no *apostille* in the margin or in the text, and no interlineation; for they cannot regard the addition of a particular page or sheet containing words occurring in their proper order and manner in the context of the deed, without interrupting any order which existed before, and without changing the effect of any prior coherent and rational context,—they cannot regard that as an interlineation either in the letter or in the spirit, or as an *apostille* in the margin of the text, whatever be the proper and exact meaning of that word.

Then comes the Canadian law, the Edict of the Council of State of 1733, which says that the notaries shall be bound to put their signatures, amongst other things, to approve and initial all *renvois* (it is admitted this is not a *renvoi*) and erasures by the parties, and so on. The letter of that law does not strike this case, nor does the spirit, as their Lordships think. The mere fact that it is written in a different handwriting,—the mere fact that this part of the only instrument which ever was brought into existence may have been manually written after that which follows it, the two together constituting on the face of the instrument one context for the intended purpose,—seems to their Lordships not to come within the law at all. It is, therefore, unnecessary to consider whether there is not in substance a sufficient certificate on the face of this notarial act, in words which do not happen to be printed in the record. These words at the end precede the signatures—"82 words erased" "—three *renvois*—approved." This, coming at the end of the entire instrument, appears to shew that the notary was careful to discharge his duty with regard to the certification of erasures and *renvois;* and it makes it in the last degree improbable that he would have omitted to certify this, if it had really the nature of an interpolation, or alteration, or addition, or *renvoi*, such as was contemplated by the law. Of course, if it was not there, and if he fraudulently added it afterwards, he might fraudulently have certified in that manner. But that supposition reduces the deed to something inconsistent with its obvious intention. The principle of these laws is the same with that which we are very familiar with in the case of wills; where that which appears to have been added, or altered, by way of erasure or interlineation, requires authentication, and otherwise would be presumed to have been subsequent to the execution of the instrument,

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the instrument without it being sensible and coherent. And their Lordships find that this is indeed the test laid down by some of the authorities cited on both sides; particularly in the case of *Savère* v. *Savère,* cited from *Dalloz* of 1851; where upon the present French law, conceived in terms somewhat similar and the same in principle, it was made the very essence of the question whether the context was complete without the addition of the words in controversy. The words which were in question were these,—it was a marriage contract, and between one line and another these words were introduced,—"*la dite donation étant faite à titre de préciput.*" Upon this, the Court said: "One of the prescriptions of the law expressly laid down is that nothing shall be added to that which, in what has been already written, forms a complete sense;" and then: "Notwithstanding that law, in the particular case, the stipulation was complete by the last words, 'a revenue of 600 francs;' those which followed, determining the character of the donation, constitute a new order of ideas, and are therefore, according to the law, words added within the meaning of the law." It appears to their Lordships that such a test applied to this case supports the instrument and not the reverse; because the sense is not complete, the deed is not coherent, without the pages which are objected to, and is so with them. This objection, therefore, as an objection of form, appears to their Lordships also entirely to fail.

Then we come to the other objection of form, with respect to the place stated upon the face of the deed as the place of passing the instrument. It is stated upon the face of the deed that it was passed in the parish of *Saint Ambroise,* in the house of the son. Upon the subject of the place, the law relied upon is the Ordinance of *Blois,* Article 167,—"Notaries shall also be bound to state in their contracts the quality, abode, and parish of the parties, and the witnesses named in them; the house where the contracts were passed," and so on. Now, if their Lordships had to determine, as a mere question of construction, the effect of those words, "the house where the contract shall have been passed," they would be obliged to say, that the terms of that law do not expressly refer to a case where the acknowledgment or signature of some of the parties has been taken at one house, and the

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acknowledgment or signature of other parties at another house, and where the notary signs and passes the act, as far as his signature is the mode of passing it, after the last acknowledgment or signature. If their Lordships were obliged to express an opinion on those words, they are by no means prepared to say that they are not susceptible of the construction, that the proper place to be certified as the house where the contracts are passed is that in which the notary completes the contract by affixing his own signature, which in this case was done; and, if that were sufficient, it would remove the objection. Furthermore, the case cited by Mr. *Bompas,* of *Evanturel* v. *Evanturel* (1) before this tribunal, is in point as to the principle. There is clear and full evidence that what was done in this case was in accordance with the customary practice of notaries of *Lower Canada,* at all events at *Quebec.* Seven witnesses, notaries, were examined on the part of the Appellants; all of them proved that this, or something similar, was their own practice and and the practice to which they were accustomed; one of them proved that, according to his experience, it was the general practice of those with whom he had done business. No evidence was offered to the contrary; which is the more remarkable, because the next witness to those upon the record is the Appellant himself, a notary at *Quebec*; and the first passage in his evidence is to the effect that the practice of notaries of *Quebec* is not to require the presence of the second notary when the act is passed. He knew what evidence had been given by the other notaries of the general practice of *Quebec;* and had it been otherwise, can it be doubted that his counsel would have given, or endeavoured to give, him the opportunity, on cross-examination, of stating his own experience and professional knowledge upon that subject? Their Lordships, under those circumstances, entertain no doubt that credit may be given to the witnesses who shew in what sense this law has been practically understood and acted upon by the notaries of *Quebec;* and they are not at all prepared to say that a notarial act passed according to that practice therefore loses its authentic character. But beyond that, the passage cited by Chief Justice *Dorion* from *Toullier* is to this effect, that if upon the face of the act there is a description which is shewn to be incorrect, the consequence is not nullity, nor that the act loses its notarial and probative character; but only that it must be proved that the place where it actually was passed was within the jurisdiction of the notary. The very same *media* of proof by which the Respondent here attempts to shew that what appears on the face of this act is applicable to the place where the sureties (using that expression for convenience and brevity only) assented,—that very same evidence shews that if they did assent, the place where they did so was within the jurisdiction of the notary. It may well be, that according to Canadian law the Appellants cannot use in their own favour the testimony which was extracted from them, or rather from *Abraham Hamel,* by the Respondent; but the Respondent has chosen to use it. He cannot use it to shew that the act was not acknowledged by the parents at the house of the son, and exclude the context, which shews that it was acknowledged, according to that statement, elsewhere within the notary's jurisdiction; and if the evidence of *Hermine Laveau* is referred to, although she pretends that they said the wife was not at home, yet so far as relates to the father, and to the place where any acknowledgment taken from the father or mother was taken, her evidence also, so far as it goes, tends to shew that such place was within the jurisdiction of the notary. So that, in truth, the means relied upon by the Respondent to discredit the deed on this point of form supply the deficiency, and shew all that, according to the authority of *Toullier*, it was necessary to shew.

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(1) Law Rep. 2 P. C. 462.

There is no other objection of form. It was attempted indeed to suggest a third, namely, that in this case the notary was not personally acquainted with the father and the mother; that it was necessary there should be independent witnesses to certify to him their identity for the purpose of the contract. But the foundation of all argument on that subject fails; for there is no evidence that those persons were not at the time known to the notary; and it would be inconsistent altogether with the principle of the credit given to notarial instruments to assume that fact for the purpose of inferring that something required by the law was omitted to be done.

Their Lordships are thus brought to the only remaining point: was or was not this instrument, which must now be taken as well

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executed, authentic and probative,—sufficient in law to bind the title which the Respondent claims through the donation of the mother? Their Lordships think that, having regard to the terms of the law and the decisions upon it, they ought to hold that it was sufficient for that purpose. The matter stands thus:—In 1808, *Joseph Falardeau*, the father, married his wife, and two instruments were then contemporaneously executed. By one of them the immoveable property in question, with other things, was conveyed by way of donation by the wife's mother to the future husband and wife, that is, to *Falardeau* and *Josephte Savard*. By the other, which was a marriage contract, *Falardeau* and his wife agreed *inter se* that they would live in community; that all immoveable as well as other property belonging to either of them at the date of the marriage should be brought into community; that it should, for the purposes of the community, be deemed moveable; and then there was a clause, called the clause of *reprise,* at the end, to the effect that when the community was dissolved by death or otherwise, the wife might at her option reclaim or resume all property brought in on her part clear and free from the debts and charges of the community; but with this qualification, that in any case in which she had bound herself, or *parlé* (which their Lordships understand to mean assented in any manner verbally or personally to a particular debt or charge), or had a judgment pronounced by some competent Court against her; in those cases she was to rely upon and to have the benefit of the liability of her husband's estate, to supply what evidently that clause supposed she would lose; and should have, as from the date of the marriage, a hypothec upon her husband's estate for the fulfilment of that contingent obligation. The community still subsisted as to this immoveable property when the deed now in question was passed in 1855. Three years afterwards the wife elected to dissolve the community, and to take the benefit of this clause of *reprise.* The question is whether, having previously assented to this notarial act passed in favour of the Appellants, she is or is not bound by the hypothec contained in that act. By the law of *Lower Canada* (it is not necessary to refer to the text), it is provided that a married woman shall not become surety for the debts of her husband; and it has been decided upon that law in the case of *Jodoin* v. *Dufresne* (1), that all engagements, though with third parties and not creditors immediately of the husband, which the wife enters into concurrently with the husband, are to be treated constructively as his liabilities; that is to say, that the contract, whether it be of suretyship for somebody else or of any other kind, is to be treated as primarily his contract, and the wife as brought in by him to secure the liability which he is going to contract. Their Lordships wish it to be distinctly understood that they express no opinion upon the question whether that case of *Jodoin* v. *Dufresne* (1) was well decided or not. It is not in their opinion now necessary to say a word which will detract from its authority, whatever that may be; but they also desire to say nothing which can be deemed to add to its authority. But, taking this to be good law, still the question remains, what the effect of that doctrine is upon this particular transaction? Now this transaction consists, as far as the Appellants and the debtor are concerned, really of three parts. In the first part it is expressed that they pledge themselves as sureties for the payment of the son's debt. The law, as interpreted in that case, clearly and beyond controversy renders that null and ineffectual as far as the mother is concerned, but leaves it perfectly effectual and valid as far as the father is concerned. Next they purport, as such sureties, to hypothecate the immoveable property in question which was then in the community as moveable. The law again, their Lordships assume, would strike at that which they purport to do as sureties by way of hypothecation, so far as the wife is concerned, and would leave that part of the deed as only the husband's deed; but it would be, as far as his power over this property in community extended, a perfectly good deed, and valid and effectual, subject to what might follow from the clause of *reprise* in the marriage contract. There is a third part of the deed which is not connected in like manner with the first or with the obligation of suretyship so far as the wife is concerned. On the contrary, it is expressed in words which shew that the framers of it were well aware that it was necessary to deal there with a distinct matter, which might or might not be effectual, apart from the preceding context. In that portion of the deed the wife expresses her consent to the hypothecation of the immoveable property in question by her husband in favour of the creditors, and renounces in their favour all claims, whether by way of property or of hypothec, which she might otherwise have been competent to make to their prejudice. Does that consent and that renunciation fail because she could not make herself a surety, and because she could not hypothecate in the character of surety? Their Lordships see no reason for holding that it does fail. In that opinion they are fortified, as appears to them, both by reason and by authority. By reason, because the wife could only claim to disturb the husband's hypothecation by virtue of the clause of *reprise*, on which she acted two or three years afterwards, in the marriage contract. But that clause of *reprise*, if you look to its terms, does not enable her to resume or reclaim anything as against a creditor in whose favour she has consented to the act of her husband during the community; and their Lordships think there is no reason or authority for holding that the law, which was passed long after that contract, to prevent married women making themselves sureties for their husbands, could enlarge the effect of the clause of *reprise* or make it operative in the wife's favour as against the husband's power over the community, in a case in which, according to the qualification expressed in its terms, it would not be so operative. It has been expressly so decided in *Lower Canada* in the case of *David* v. *Gagnon* (1); and although that appears to be the decision of a single Judge, their Lordships see no reason to doubt that it was well decided, and they have no reason to suppose that it has ever since been called in question. The other authorities also go to the effect, that, although there may be in a deed an ineffectual attempt to bind a married woman by words of obligation, yet a renunciation of this kind in the same deed is perfectly good. Two decisions of the Courts of *Lower Canada*—no doubt by a majority of Judges in each case, and I think one Judge changed his mind—Chief Justice *Duval*—are referred to in the record; both of which determined that the renunciation and the consent of the wife to her husband's act, as against such rights as she might have under a marriage contract, whether of hypothec or of *reprise*, may be good, although she could not bind herself by

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(1) 3 Low. Can. Rep. 189.

(1) 14 Low. Can. Rep. 110.

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a direct contract, which she had attempted to do in the same deed. Their Lordships see no reason to differ from those decisions. It therefore is unnecessary to go into the further consideration of the question, whether a clause of *reprise* may or may not be so conceived as to destroy the husband's power over mobilised immoveables of the wife *durante communitate*. *Pothier* evidently thought the better opinion was that no clause of *reprise* would do so, for that the effect of mobilisation and the effect of community taken together required, that while the community subsisted the husband should be able to deal with the immoveables as moveables; but at the same time, recognising some difference of opinion among jurists on the subject, he suggested, that clauses should be worded so as to remove that doubt; and this clause in fact has been so worded. The other authority, *Renusson*, relied upon by the Respondent, most distinctly recognises the general power of the husband, during the community, not only to sell, but to hypothecate the wife's immoveables under such circumstances; and all that can be said to the contrary, as far as he is concerned, is that he saves and does not determine the question, what the effect of a clause of *reprise* might be, supposing it were expressed in terms which clearly were intended to give the wife a right paramount to any hypothecation or alienation by her husband. The authorities, as far as they go, upon this subject, appear to their Lordships to be entirely one way, and that is against the Respondent.

On the whole case, they are of opinion that the present appeal must be allowed, and with the usual consequences as to costs.

Their Lordships will therefore humbly recommend Her Majesty to reverse the judgment of the Court of Queen's Bench for the province of *Quebec*, with costs, and to affirm, with costs, the judgment of the Superior Court.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*

Solicitors for the Respondent: *Ashurst, Morris, & Co.*

[PRIVY COUNCIL.]

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Jan. 18.

KLEINWORT, COHEN, & CO. . . . . . APPELLANTS;

AND

THE CASSA MARITTIMA OF GENOA . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Hypothecation of Cargo—Duty of the Master—Bottomry Bond—Communication with the Owners.

L P.D. 3:5, 140

A master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *à fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation.

APPEAL from a judgment of the Supreme Court of the island of *Ceylon* (June 15, 1875) reversing a decree of the District Court of *Galle* (Oct. 23, 1874).

The facts appear in the judgment of their Lordships.

Mr. *Cohen*, Q.C., and Mr. *Clarkson*, for the Appellants.

Mr. *Milward*, Q.C., and Mr. *R. E. Webster*, for the Respondent.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The question in this case is, whether a bottomry bond given by the master of the *Maria Luisa* upon the ship and cargo to the Respondents, who are a company at *Genoa*, is a good hypothecation as regards the cargo. The way in which the case came before the Lower Court for decision was this: An action was brought upon the bottomry bond by the Respondents against the master of the ship, and judgment was given in favour of the Respondents in that action. A second action was brought in the Lower Court by the present Appellants, the owners of the cargo, against the master for what they contended was an unauthorized sale of the cargo. In that action judgment was also given for the Plaintiffs, the present Appellants, but an order was made that the proceeds of the cargo should be sequestrated until the question as to the validity of the bottomry bond could be decided, and the rights of the Plaintiffs, as owners of the cargo, and of the Respondents, as the lenders upon the bottomry bond, could be ascertained. It is unnecessary to detail at any length what the proceedings were, but in this latter proceeding, the question which has been already stated arose. It is admitted that the law is now settled, that a master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *à fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable.

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* *Present:*—LORD BLACKBURN, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The law has been thus laid down in several cases which have been referred to at the Bar, and it is only necessary to notice one or two of them. One of those cases was *The Bonaparte* (1), in which the judgment was delivered by Lord Justice *Knight Bruce*. In that judgment, according to the corrected report of it in the subsequent case of *The Hamburg* (2), it was said: "That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate or even endeavour to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so." Then follows the sentence which was not correctly reported in the original report of *The Bonaparte*. The passage is this: "If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

This duty was affirmed, and the cases referred to, in a recent decision of this Committee in the case of *The Australasian Steam Navigation Company* v. *Morse* (3).

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(1) 8 Moore, P. C. 459.
(2) B. & Lush. 253, 273; S. C., 2 Moore, P. C. (N.S.) 289, 320.
(3) Law Rep. 4 P. C. 222.

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The latest case on the subject, *The Onward* (1), is in its facts extremely like the present, and there the law was thus stated by Sir *Robert Phillimore.* He cites the language of this tribunal in a judgment delivered by Sir *John Jervis* in the case of *The Oriental* (2), to this effect: "There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication,—not to send money, as suggested, because the electric telegraph will not carry money, but to send a communication on the one hand and receive an answer on the other. There being the means of communication, and the authority of the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no authority in the master to raise money on bottomry." Sir *Robert Phillimore's* observations following that citation are: "In the opinion, therefore, of this Appellate Court, whose decisions are binding upon me, a mere statement of injuries done to the ship and of the consequent necessity of repairs which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had recourse to, was not a sufficient communication to the owners." In this view of the law their Lordships entirely agree.

It is not necessary to go at any great length into the facts of the case, but those which are material to be considered are as follow: The cargo, which was of rice, was shipped on board the *Maria Luisa* at *Rangoon.* The bill of lading stated that it was shipped by *Gerber, Chrestien, & Co.*, who carry on business at *Rangoon.* The cargo is stated to be "10,700 bags new *Rangoon* cargo rice," and the destination of the ship was "*Queenstown, Plymouth, Falmouth,* or *Cowes*" for orders, and the rice was made deliverable to order, that is, to the order of the shippers. It seems that the *Maria Luisa* sailed from *Rangoon* in July 1872, and it may be taken that in the course of her voyage she met with bad weather and received considerable damage. On the 7th of September, 1872, she put into *Trincomalee,* and there, according to the evidence of the master—and he is supported to some extent

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(1) Law Rep. 4 A. & E. 38, 55.

(2) 7 Moo. P. C. 398, 411.

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by other witnesses—the vessel required very considerable repair, she wanted re-coppering, new sails, and other things. For the purposes of the present decision—although their Lordships do not intend to affirm the facts—it may be assumed that the ship was in a state of distress requiring considerable repairs, that it was not possible to raise the money upon the personal credit of the owners of the ship or of the master, and that the security of the ship alone was not sufficient for the advances which were required to repair the ship. It seems to have been thought by the learned Judges in the Court below that the cargo was in a damaged state, and that money was wanted either for the purpose of carrying the cargo on speedily, or for some necessary expenditure for the purpose of putting the cargo into better condition by drying it, or otherwise. Upon looking at the evidence, that appears to be a mistaken view of the facts. According to the master's evidence the cargo was landed at *Trincomalee*, and remained there for a considerable time until he re-shipped it; but when he did re-ship it the rice was in good condition, and for anything that appears nothing had been done to it except that, of course, when taken out of the ship it had been stored. A small quantity was thrown overboard, which appears to have been at the bottom of the ship, and damaged; but there is no evidence that the bulk of the cargo was in any way damaged so as to require its being carried on speedily, or any expenditure incurred for its preservation.

The master being at *Trincomalee* and under the necessity of raising money—which has been, for the purposes of this decision, assumed—it appears that he communicated with the agents of the present Respondents, the *Cassa Marittima*, and agreed with them, on the 10th of December, 1872, to hypothecate the ship, cargo, and freight. The bottomry bond which was executed in pursuance of that agreement is dated the 12th of March, 1873. Taking the earlier of these dates, the 10th of December, their Lordships are of opinion that there was before that time a reasonable possibility of communicating to the owners of the cargo or those who represented the owners what was intended to be done, and that that communication not having been made there was a want of authority on the part of the master to execute the bond on the 12th of

March, or indeed to enter into the agreement on the previous 10th of December.

It may be stated that the ship sailed from *Trincomalee* on the 11th of April, 1873, having re-shipped the rice; that she put into *Point de Galle* in May, 1873; and that in August of that year the cargo, being then, according to surveys made at *Galle*, in a perishable condition and unfit to be carried on, was sold. In the present appeal their Lordships have nothing to do with the question whether this sale was a justifiable one or not. The only question before them for determination is whether there was sufficient authority to execute the bottomry bond?

The duty of the master to communicate with the owners, or those who may be fairly taken to represent the owners, before taking this extreme step, being plain, let us see what he did. It appears that he considered *Gerber, Chrestien, & Co.* as the owners of the cargo, and he had reason to do so. He knew no other owners. They were the shippers of the cargo, and had taken the bill of lading from him, making the cargo deliverable to their order, and throughout he appears to treat them as the owners of it, until at a later period, when probably the difficulty was made apparent, he says that he did not know who the real owners were, and therefore could not communicate with them. Mr. *Webster*, who appeared for the Respondents, has very properly admitted that if communication were necessary, *Gerber, Chrestien, & Co.* were the persons to whom it should have been made; and he has not denied that the case resolves itself into the question whether, they being the persons to whom the communication ought to have been made, that which was in fact made to them was sufficient or not? The master telegraphed to them shortly after his arrival at *Trincomalee*; he says two days after the ship had put into that port; that she was leaking, and in want of repair. It appears that *Gerber, Chrestien, & Co.* telegraphed back to him requesting information, with more particularity as to the state of the ship and cargo. That telegram is dated the 19th of September, and no answer appears to have been given by the master to it. An important letter was put in evidence from *Gerber, Chrestien, & Co.* to the master, complaining of his neglect in not giving them further particulars. The letter, dated the 1st of November, 1872, is as follows: "Our telegram of the 19th September, requesting you to be so good as to give us particulars of the damage suffered by your cargo, having remained unnoticed, we now beg to request you will be so good as to tell us when you intend to sail from *Trincomalee* after completing the repairs of your ship; if you are taking on all the rice shipped by us here; or, if any has been sold, how much, and all other particulars which may be of interest to us as shippers of the cargo." Now what was the duty of the master when he received this letter? If his duty was not clear before, there was now a distinct request by the shippers of the cargo to know what the state of the cargo was; whether it would be taken on; if any had been sold, how much had been sold; and all other particulars which might be of interest to them as shippers of the cargo. The master at the time he received this letter, or shortly after, must have contemplated hypothecating the cargo, and instead of communicating to those whom he knew to be the shippers of the cargo that he was going to hypothecate it, he maintains an absolute silence. This letter is dated the 1st of November. The agreement to hypothecate is not made until the 10th of December, long after its receipt. The rice was, upon the evidence, receiving no damage, yet the master undertakes to hypothecate it to the *Cassa Marittima* upon this bottomry bond without giving the slightest intimation to the shippers that he was going to do so. This appears to their Lordships to be a strong case of dereliction of duty on the part of the master, when about to take the extreme course of hypothecating the cargo for the needs of the ship. If *Gerber & Co.* had been communicated with they might have said, "We will advance the money rather than you should raise it upon bottomry interest;" or they might have given him other directions which it might have been more for their interest that he should have followed than to have taken this unauthorized course.

Their Lordships cannot but observe that the learned Judge who decided this case on appeal from the district Judge seems to have given his decision under some mistake as to the facts. In one part of his judgment he says: "The shippers of the cargo therefore knew at a very early period that the cargo had suffered damage, and that the vessel wanted repairs. The telegram was sent, the Defendant swore, as soon as he arrived at *Trincomalee*. Rice, when

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once heated and fermented, runs rapidly from bad to worse. Mr. *Spence*, one of the surveyors, says that the rice was much heated and discoloured, and the stench in the hold gave evidence of rapid decay going on in the cargo." It turns out that the rice was not heated and fermented at *Trincomalee*, although it was subsequently in that condition at *Galle*; and Mr. *Spence* was the surveyor not at *Trincomalee* but at *Galle*. Thus the learned Judge appears to have transposed the state of things which existed at *Galle* to *Trincomalee*. Then he goes on: "The master himself swears that, so far as he knew, the shippers were the owners of the cargo, and this evidence is unrebutted." The learned Judge, in that passage seems properly to have taken the view that *Gerber & Co.* were the right persons to be communicated with. Then he says: "From September, when he sent his telegram to *Gerber, Chrestien, & Co.*, till August, 1873, when the rice was sold, he received no instructions or offer of funds from them or from the parties who now claim the rice as consignees." Their Lordships cannot but observe that this passage involves an assumption which is erroneous in point of law. The judgment of the learned Judge really amounts to this:—That *Gerber, Chrestien, & Co.* were the proper persons to be communicated with, but that the communication made to them was sufficient, and that it became their duty, upon the slight information they had, at once to offer money to the master for the necessary repairs of the ship. Their Lordships think no such duty was imposed upon *Gerber, Chrestien, & Co.*, and that they did what men of business might reasonably be expected to do. Upon having the general information that the ship had received damage and wanted repairs, and that the cargo might also be damaged, they wrote to the master to know the particulars, and, as before observed, received no answer to that letter.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, and to affirm the decree of the District Judge of *Galle*. The Respondents must pay to the Appellants their costs of the proceedings in the Supreme Court, and of the appeal to Her Majesty.

Solicitors for the Appellants: *Hollams, Son, & Coward.*
Solicitor for the Respondents: *Thomas Coward.*

[PRIVY COUNCIL.]

J. C.*
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Feb. 6.

ALFRED WOOLLEY AND OTHERS . . PLAINTIFFS;

AND

THE ATTORNEY-GENERAL OF VICTORIA . . . . . . } ONE OF THE DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

5 & 6 Vict. c. 36—Grant of Waste Lands in Victoria—Rights of the Crown in Gold and Silver found under the Soil.

A grant of waste lands in *Victoria*, under the Imperial Statute, 5 & 6 Vict. c. 36, and made before the passing of the Imperial Statute, 18 & 19 Vict. c. 55, does not transfer to the grantee the gold and silver that may be found under the lands so granted.

APPEAL from a decree of Mr. Justice *Molesworth*, Judge of the Supreme Court of the Colony of *Victoria* (October 4, 1875), allowing the demurrer of the Respondent and dismissing the bill as against the Respondent.

By a grant from the Crown made in *Victoria*, the 18th of June, 1853, a parcel of land, being part of the waste lands of the Crown in the colony, was granted to *D. S. Campbell* and the Appellant, *H. Creswick*, in consideration of £939 paid by him into the colonial treasury. By another grant from the Crown, also in *Victoria*, the 18th of June, 1853, another grant of land, being part of the waste lands of the Crown in the colony, was granted to *W. Kaye*, in consideration of the sum of £252 paid by him into the colonial treasury. Each of these grants was subject to the following and no other reservation, viz: "Provided nevertheless, and we do hereby reserve unto us, our heirs and successors, all such parts and so much of the said land as may hereafter be required for making public ways, canals, or railroads, in, over, and through the same, to be set out by our Lieutenant-Governor for the time being of our said colony, or some person by him authorized in that respect, and also all sand, clay-stone, gravel, and indigenous timber, and all other materials the natural produce of the said land which may be required at any time or times hereafter for the construction and repair of any public ways, bridges, canals, and railroads, or any fences, embankments, dams, sewers, or drains necessary for the same, together with the right of taking and removing all such materials. And we do hereby further reserve unto us, our heirs and successors, the right of full and free ingress, egress, and regress, into, out of, and upon the said land for the several purposes aforesaid."

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* *Present*:—LORD BLACKBURN, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

At the date of these grants no gold or other mine had been opened in the land thereby granted.

By virtue of divers assurances by the Crown grantees and by purchasers from them, the whole of the one parcel and part of the other parcel became vested in the Appellants as trustees for the *Coliban Mining Company.*

The Appellants, on the 23rd of June, 1875, filed their bill against the *Iron Stone Hill Lead Gold Mining Company, Limited*, and other persons, and also the Respondent. The bill alleged that the Defendant company had sunk a shaft and constructed a drive in land adjacent to the land so vested in the Appellants, and by means of the said shaft and drive had driven into the lands of the Appellants and removed large quantities of auriferous earth and gold therefrom, and would continue to carry on mining operations in the lands of the Appellants and to remove gold therefrom unless restrained by injunction; that the mining operations of the Defendant company were conducted under the orders of the other Defendants (except the Respondent), who were respectively the directors and mining manager of the Defendant company; and that the Respondent pretended that Her Majesty the Queen was entitled to all gold in the lands so vested in the Appellants; and that Her Majesty, or he on her behalf, was alone entitled to relief in respect of the abstraction of auriferous earth and gold from the said lands by the Defendant company; but the Appellants submitted that upon the grant of the said lands the right to all gold therein passed to the grantees thereof, and that neither Her Majesty nor the Attorney-General on her behalf had any interest therein or in anything recoverable in respect of the abstraction of gold from the said lands. The bill

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prayed for an injunction against the Defendant company, and that the Defendants other than the Respondent might be ordered to pay to the Appellants the value of the gold and auriferous earth so taken as hereinbefore mentioned by the Defendant company.

The Respondent demurred to the bill on the ground that the Appellants were not, as against Her Majesty, entitled to any of the gold or auriferous earth in the lands mentioned in the bill.

Mr. Justice *Molesworth*, on the 4th of October, 1875, delivered judgment (1), allowing the demurrer and dismissing the bill as against the Respondent.

The reasons for this judgment were in substance that it has been decided that a grant by the Crown of lands in *England* will not pass gold or silver mines unless they are expressly granted, and that all the reasons stated for the existence of the right of the Crown in *England* equally apply to the case of grants of land in the colonies.

Mr. *Joseph Brown*, Q.C., and Mr. *J. D. Wood*, for the Appellants:—

Although the decisions in *England* (see especially *Reg.* v. *Earl of Northumberland* (2)) are to the effect that mines of gold and silver will not pass by a grant from the Crown without express words granting them, yet the principle of such decisions is wholly inapplicable to the colony of *Victoria*. At the time of its establishment in *England* grants by the Crown of its lands had the effect of impoverishing the Crown, being made from favour and without consideration moving from the grantee. In *Victoria*, on the other hand, grants by the Crown have always had the effect of enriching it, not being made except in consideration of a money payment. The right of the Crown to gold in the soil was held not to be an inalienable right: see Lord *Dyer's* judgment, p. 336 a, in the first volume of *Plowden*. Reference also was made to 2 *Coke's* Institutes, 577; and the case of saltpetre, 6 *Coke's* Reports, 208; and *Bainbridge* on Mines [3rd Ed.], pp. 55, 59, 60. The earlier statutes on the subject are 1 Wm. & M. st. 1, c. 30; 5 & 6 Wm. & M. c. 6; 55 Geo. 3, c. 134; and the later Act of 5 & 6 Vict. c. 36 must be construed in reference thereto. According to the true construction thereof, everything was intended to be conveyed to the purchaser from Her Majesty which was not expressly reserved or excepted out of the grant. Further than that, the fact that in the Crown grants other reservations or exceptions were made shews that it was not intended that gold mines should be reserved. The general understanding of the Legislature upon this subject may be seen by reference to the preamble to 18 & 19 Vict. c. 55; to Victorian Act, 21 Vict. No. 32, s. 74, explained by 24 Vict. No. 111, s. 2; 15 Vict. No. 15; 17 Vict. No. 1; 18 Vict. No. 37, in which the waste lands of the Crown are dealt with, not lands belonging to private owners. As for the right to mine, see *Stephen's* Commentaries, vol. ii. p. 549; *Millar* v. *Wildish* (1); *Attorney-General* v. *Gee* (2).

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(1) 1 Vict. Law Rep. Eq. 237.

(2) 1 Plow. 310.

Mr. *Cotton*, Q.C., Sir *James F. Stephen*, Q.C., and Mr. *C. Bowen*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

Their Lordships are of opinion that this appeal must fail. The point is an extremely narrow one, though it may be one of considerable importance. It is simply whether upon the sales of waste lands of the Crown, which are set forth in the bill, the gold that might be found in such lands passed to the purchasers, there being no words in the grants from the Crown expressly granting it. Now whatever may be the reasons assigned in the case in *Plowden* for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in *England* that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass. It was fairly conceded by the learned counsel for the Appellant that this rule must be taken to have been introduced as part of the common law of *England* into the colony of *Victoria*. The question, therefore, resolves itself into

(1) 2 Wyatt & Webb (Eq.) 37.

(2) 2 Wyatt & Webb (Eq.) 122.

this: whether, the statute 5 & 6 Vict. c. 36, has so modified the common law, that a sale of waste lands under that statute must be taken to include a grant of the gold and silver that may be found under the lands so granted.

It is upon the construction of this statute alone that the present question turns. The grants in question were made in the year 1853, and, therefore, before the passing of the statute of the 18 & 19 Vict. c. 55, when the Crown in 1855, whilst sanctioning the Act of the Local Legislature which is known as the *Constitution Act*, formally transferred its rights in the gold and silver in the colony to be dealt with by the Colonial Legislature.

Their Lordships have carefully considered the arguments addressed to them, and the provisions of the statute 5 & 6 Vict. c. 36, and they can find nothing in the latter which leads them to the conclusion that a construction ought to be applied to a grant of Crown lands under that statute different from that which a similar grant would obtain in this country. The object of the Act was to empower the governor of the colony to deal with the waste lands of the Crown in the colony, by putting them up for sale under certain conditions by public auction. The Crown seems still to have retained a certain interest in and power of disposition over the proceeds to be realized by the sales; for the 19th section provides that, "subject to the charge above mentioned," meaning the charge mentioned in the 18th section for the expenses of surveying and the like, "the gross proceeds of the sale of the waste lands of the Crown in each of the colonies shall be appropriated and applied to the public service of the said colonies respectively, in such manner as Her Majesty or the Commissioners of Her Majesty's Treasury, or any three of them, shall from time to time direct." It is expressly provided that one half at least shall be applied to the purpose of emigration; but, subject to that provision, it would seem that there remained in the Crown as represented by the Home Government the power of directing the application of the proceeds to be realized by the waste lands. There is no reference to the rights of the Crown in the precious metals to be found under the soil; and it is a recognised principle of the construction of statutes that the prerogative rights of the Crown can be affected only by express words

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or necessary implication. The state of things that existed when these grants were made has been altered by the later Imperial Statute and the subsequent legislation in the colony; but with the effect of this we have not now to deal.

Their Lordships therefore fully concur with Mr. Justice *Molesworth* in the reasons assigned by him for his judgment; and they will humbly recommend Her Majesty to confirm that judgment, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Wilde, Barber, & Browne.*
Solicitors for the Respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

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THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MONTREAL . . . APPELLANTS;

AND

THOMAS STORROW BROWN AND JAMES K. SPRINGLE (COMMISSIONERS IN RE EXPROPRIATION OF ST. JOSEPH STREET) . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (CANADA).

Statute of Canada, Act 27 & 28 Vict. c. 60—Commissioners in Expropriation—Order of Removal by Superior Court—Right of Appeal to Court of Queen's Bench.

The Respondents and one *M.*, having been appointed Commissioners in expropriation under Provincial Act 27 & 28 Vict. c. 60, made their valuation of certain land which had been expropriated. On petitions to the Superior Court by certain contributories and the Appellant corporation, the Respondents were removed from office on the ground that they had in their valuation adopted a principle which was so palpably erroneous that its adoption amounted to a want of diligence which justified the Court in ordering their removal. This decision was subsequently reversed by the Court of Queen's Bench:—

Held, that an appeal lay from the Superior Court to the Court of Queen's

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* *Present*:—SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, and SIR HENRY KEATING.

Bench from the above order of removal, which having been made after proceedings usual in an ordinary suit, was to all intents and purposes a final judgment of the Superior Court within the meaning of the 1115th article of the *Code of Civil Procedure.*

It is not a palpably erroneous principle in valuing land under the above-mentioned Act to take into consideration its prospective capabilities; nor does the adoption of such a principle justify a finding of "want of diligence" under sect. 13, sub-sect. 9 of the said Act.

THIS was an appeal from the judgment of the Court of Queen's Bench for *Lower Canada* (Appeal side), of the 20th of September, 1873 (see 16 Low. Can. Jur. 1), reversing and annulling, in favour of the Respondents, the judgment of the Superior Court sitting at *Montreal,* of the 17th of September, 1870, upon a petition of the Appellants, by which the Superior Court stayed the proceedings of one *Damase Masson* and the Respondents, Commissioners in expropriation, and removed the Respondents, and replaced them by two other persons named in the judgment, and ordered that the two thus named, jointly with *Damase Masson,* should proceed to determine the price or compensation to be allowed for a certain lot of ground described in the judgment, which the Appellants had resolved to acquire for the widening of *St. Joseph Street,* in the city of *Montreal.*

A petition similar to that of the Appellants was presented at the same time to the Superior Court by certain persons in *Montreal, Walter Benny* and others, the parties liable to pay the costs of acquiring the said lot of ground. The above-mentioned judgments of the Superior Court and of the Court of Appeal were delivered upon both petitions. Leave to appeal was granted to these parties, as well as to the Appellants, and the Appellants prosecuted this appeal not only on their own behalf but on behalf of these parties.

Acting under the provisions of the Statute of *Canada* 27 & 28 Vict. c. 60, regulating expropriation in the city of *Montreal,* the council for the city, on the 4th of December, 1867, passed a resolution to widen *St. Joseph Street* in front of the property of the Honourable *Charles Wilson,* and for that purpose to acquire a certain portion of the said property, on the express condition that the whole cost of so doing should be assessed upon the pieces of land belonging to parties interested in, or benefited by, the improvement.

This portion of Mr. *Wilson's* property was described in the notices issued by the Respondents under 27 & 28 Vict. c. 60, s. 13, subs. 1, as "A piece of land with part of a building thereon, and further designated by its boundaries."

Accordingly on the 6th of April, 1868, the Appellants presented a petition to the Superior Court reciting the resolution of the council of the city to widen *St. Joseph Street*, and praying the Court to nominate three competent and disinterested persons to act as Commissioners to fix and determine the price and compensation to be allowed for the lot of ground required by them for their improvement. And on the 14th of April, 1868, Mr. Justice *Monk* nominated *Damase Masson* and the Respondents as such Commissioners, and directed them to begin their operations on the 25th of April, and to make their report to the Court on the 4th of July then next ensuing.

The time for making the report was subsequently enlarged to the 10th of August, 1868.

This case arose upon the principles of compensation adopted by the Respondents in these operations, which led to the above-mentioned petitions of the Appellants, and of *Walter Benny* and others, to one of the Judges of the Superior Court to stay the proceedings, and to remove and replace the Respondents under sect. 13, sub-sect. 9, of the above Act.

These petitions, presented on the 10th of August, 1868, after stating the appointment of the Commissioners by the judgment of the 14th of April, 1868, and the enlargement of the time for making their report, represented that the Commissioners, after their appointment, proceeded to the valuation of the property, and that a report was made by *Damase Masson* awarding $7867. 50*c.*, as compensation, and that the Respondents made a separate report awarding the excessive and unreasonable amount of $19,500.

That the Commissioners notified the interested parties to appear before them on the 25th of July to shew cause if any they had against the report.

That the Appellants, by a resolution of the council, determined that their attention had been called to the extraordinary award declared by the Respondents, and instructed an application to be made by summary petition to the Superior Court to stay the proceedings and to remove and replace the Respondents.

The petitions then contained certain allegations imputing acts to the Respondents during the proceedings inconsistent with their duties, and continued :—

That the Petitioners further represented that the Respondents had not fulfilled their duties in a faithful, diligent, and impartial manner, and prayed that the Judge would order that the proceedings of the three Commissioners should be stayed, and that the Respondents should be removed, as having violated and forfeited their obligations, and that two other competent and disinterested persons should replace them, and be instructed conjointly with *Damase Dasson* to proceed anew to the valuation of the property to be expropriated, and to determine the compensation to be paid for it.

To these petitions the Respondents filed separate but similar answers, in substance as follows :—

They denied that the Court had, under the Statute, power to inquire into the correctness of the award of Commissioners in expropriation, upon an accusation of partiality made by a party not satisfied with the amount awarded, and founding his accusation solely upon the supposed unreasonableness of such award. They recited the appointments of *Damase Masson*, together with themselves, as Commissioners, and the proceedings of the Commissioners. They then said that on the 11th of July, 1868, the Commissioners met for the purpose of making these preliminary appraisements, when the Respondents made a preliminary appraisement of the compensation to be allowed to *Charles Wilson* at $19,500. That thereupon the Commissioners called a meeting of the parties interested, to the end that, after the parties had been heard, the Commissioners might decide whether they should maintain or modify the preliminary appraisement. That on the 25th of July and certain other days the parties liable to pay the costs of the improvements appeared before the Commissioners, and submitted their objections ; and that the Respondents on the 7th of August finally made and signed their reports of appraisement, and after certain deductions from the above-mentioned sum awarded *Charles Wilson* thereby $13,066. 64*c*. They explained these deductions, and prayed that the petition of the Appellants might be dismissed with costs.

Issue was joined, and evidence taken on both sides.

The case was heard before Mr. Justice *Berthelot* on the 27th of December, 1869, and the 25th of January, 1870, and on the 17th of September, 1870, the learned Judge gave judgment with costs in favour of the Appellants.

The following are the considerations of the judgment:—

"Considering that the Commissioners, *T. S. Brown* and *J. H. Springle*, nominated April 14th, 1867, by the Honourable *S. C. Monk*, Judge of the Superior Court, in virtue and under the authority of sub-sect. 5 of sect. 13 of 27 & 28 Vict. c. 60, were as such vested with the same powers and entrusted with the same duties as are conferred by the laws in force in *Lower Canada* upon experts in reference to appraisements: seeing that it results from the oral and written evidence, and more particularly from the oral statements of the Commissioners themselves, and from their writings, that they have misconceived their position in this respect.

"Considering that according to this same evidence it appears that the aforesaid two Commissioners proceeded to estimate the intrinsic value of the part of the property expropriated, and the damage resulting from the expropriation to the residue of the property, according to calculations and data wholly outside what the law authorized, and that they introduced into the estimate of the said damages, losses and supposed diminution of revenue and income upon buildings and warehouses which were not built, and which might not be constructed by the party whose property was to be expropriated, and this estimate was altogether hypothetical, speculative, and uncertain, while the damages to be appraised in such case might and could extend only to things in existence at the times and on the day of the expropriation and of their report. Seeing that by so doing, and by following this mode of appraising the damages, they have ended in making a report, exorbitant, and out of all proportion with what could be considered just and reasonable, by adopting thus such false ideas of valuation and of calculation in contravention of the law in regard thereto; considering that in this the said two Commissioners *T. S. Brown* and *J. H. Springle* have acted contrary to the law, and have entirely misconceived it, and that they have persisted in their error; seeing that by this conduct on their part in misconceiving so

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manifestly the law and its requirements on their parts in respect thereof, they ought to have informed themselves more accurately; they have failed to perform their duties as Commissioners aforesaid, according to terms of sub-sect. 9 of sect. 13 of the aforesaid statute in a faithful and diligent manner, not bringing thereto the attentive consideration, the care and exertions, which they ought to have brought.

"Considering that for these reasons in virtue of the authority conferred by the sect. 9 upon this Court, and one of the Judges thereof, there is ground for staying the proceedings of the said Commissioners *D. Masson*, *T. S. Brown*, and *J. H. Springle*, and for removing and replacing the said two Commissioners *T. S. Brown* and *J. H. Springle*."

On the 20th of September, 1873, the Court, Chief Justice *Duval* dissenting, gave judgment, reversing the judgment of the Superior Court.

The following are the principal considerations of the judgment which dealt with the petitions, both of the present Appellants and of *Walter Benny* and others.

"Considering that by the judgment of the Superior Court, the conclusions of the petitions were granted only on the ground that the two Commissioners had committed an error of judgment, and had taken as the basis of their report false notions of expropriation;

"Considering that the said Court has dismissed as unfounded the charges made against the two Commissioners of want of diligence and of faithfulness in the performance of their duties, and especially the charges of fraud and partiality, and that in this respect the said judgment is not open to criticism;

"Considering that by the law of this country an appeal lies to the Court of Queen's Bench from any judgment rendered by the Superior Court, or any Court of concurrent jurisdiction;

"Considering that the judgment rendered in the present cause and in question is by law susceptible of appeal before this Court, whether it be considered a final judgment or an interlocutory judgment;

"Considering that on the hypothesis that this judgment was only interlocutory, and, as such, not susceptible of appeal, until after appeal allowed, the Respondents (the present Appellants), by not urging within the permitted delay, and in manner provided by the *Code of Procedure*, these reasons against the right of appeal of the two Commissioners, have virtually admitted such right of appeal, and have released the two Commissioners from the necessity of asking the Court for leave to appeal;

"Considering that the Superior Court could not, for any other reason, except those specified in the statute 27 & 28 Vict. c. 60, s. 13, sub-s. 9, remove the two Appellants from their office of Commissioners, or stay their proceedings, and could still less substitute its own appraisement, or that of certain witnesses, for the appraisement of the said Commissioners, alone empowered to fix the appraisement.

"Considering that the said judgment has been rendered in excess of jurisdiction and *ultra petita et ultra vires*."

Mr. *Fry*, Q.C., and Mr. *Gibbs*, for the Appellants:—

It is contended that the Court of Queen's Bench had no jurisdiction to entertain the appeal presented to it from the judgment of the Superior Court. The case turns upon Act 27 & 28 Vict. c. 60, regulating expropriations in the city of *Montreal*. Sect. 13 of this statute provides the mode of procedure in cases of expropriation, and sub-sects. 5, 6, 7, 8, and 9 of the section define the duties and powers of the Commissioners, and the jurisdiction of the Superior Court over them. The principal articles of the *Code of Civil Procedure of Lower Canada* relating to experts are 321–339, 344–6; and for a discussion upon the law and procedure of expropriation in *Lower Canada* see *Mayor of Montreal* v. *Drummond* (1). The general Code does not modify the provisions of the special Act, which does not in terms, or by necessary implication, give an appeal from the order of the Superior Court, but (see sect. 13, sub-sect. 9) vests in the Superior Court a discretionary power of issuing such orders as may be deemed conformable to justice. The special Act must give the right to appeal if such right is to be held to exist; and from its silence upon that subject it must be inferred that no such right was intended to be given. See

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(1) Law Rep. 1 App. Cas. 384.

Attorney-General v. *Sillem* (1), where it was held (p. 720) that the creation of a new right of appeal requires legislative authority. "It is not competent," said Lord *Westbury* in that case, "to either tribunal or to both collectively to create any such right. Suppose the Legislature to have given to either tribunal, *i.e.*, to the Court of first instance and to the Court of Error on Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another." For an instance of a right of appeal being granted in express terms see *Consolidated Statutes of Lower Canada*, c. 77, s. 23 (citing 34 Geo. 3, c. 6, s. 27; 12 Vict. c. 38, s. 37, and 20 Vict. c. 44, s. 17). Reference was then made to *Jenkyns*' 3rd Century, case 41, and 5th Century, case 11: *Trustees of Birkenhead Docks* v. *Laird* (2), in which one of the cases in *Jenkyns* is cited: *Fitzgerald* v. *Champneys* (3). The *Code of Civil Procedure* contains internal evidence that it was not intended to effect any alteration in the special Act. As regards the right of appeal the intention was not to give any new rights, but to codify existing law: see *Consolidated Statutes*, c. 2, s. 6, and arts. 1115, 1116 of the *Civil Procedure Code*. The decision in this case was not a final judgment within the meaning of these sections. The proceeding in which it was given was a summary proceeding commenced by petition under 27 & 28 Vict. c. 60, and not by writ of summons. It was not enforceable by writ of execution. Moreover, a proceeding before homologation cannot be appealable, when the homologation itself, which is the final step in the proceeding, is not appealable. Whenever the Court of Chancery acts under a statutory jurisdiction, no appeal lies from its orders unless conferred by statute: see Sir *Samuel Romilly's Act*, enabling the Court of Chancery to do on petition what before was done by bill. That Act expressly reserves the right of the House of Lords to entertain appeals. *Sir George Turner's Act* also gives a right of appeal in express terms. The *Trustees Relief Act* enabled relief to be granted on petition instead of by bill, and it reserved the right of appeal

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(1) 10 H. L. C. 704. 10 Jur. N.S. 446.

(2) 4 D. M. & G. 732; 23 L. T. (Ch.) 457. (2) S.C. 18 Jur. N.S. 585.

(3) 2 J. & H. 31. 7 Jur. N.S. 1006

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to the House of Lords. On the other hand, the *Trustee Act* does not expressly give an appeal, and it has accordingly been held that no appeal lies. Again, *Lord St. Leonards' Act* gave no right of appeal, and Lord *Hatherley* held there was no appeal under it. Reference was then made to *Re Mockett's Will* (1).

As to the jurisdiction of the House of Lords, it was much considered in *Wall* v. *Attorney-General* (2), where it was held that an order made by the Court of Exchequer, consequent upon a judgment of the Barons in the matter of an extent upon facts reported by the Deputy Remembrancer to the Court, on a reference to him, is not the subject-matter of an appeal to the House of Lords, because it is a proceeding at law and not in equity. An interlocutory order of Chancery can be appealed against, but not orders of the Courts of Common Law: see *Bignold* v. *Springfield* (3). The House of Lords has asserted the appellant jurisdiction from the Court of Chancery in very wide terms: see *O'Sullivan* v. *Hutchins* (4). The right of appeal in *Canada* is regulated by the *Consolidated Statutes*, c. 77, s. 23, p. 648.

Secondly, it is also contended that the Appellants did not, as stated in the judgment under appeal, virtually admit such right of appeal, but that their objection to such right having been twice put forward, in their answer to the reasons of appeal, and in their case filed on the 17th of June, 1872, the point had been sufficiently raised.

Thirdly, upon the merits. [SIR H. KEATING :—Their Lordships prefer that the argument upon the first two points be proceeded with first.]

Mr. *Bompas*, and Mr. *Kenelm Digby*, for the Respondents :—

The pleadings at once shew that this is practically a suit, lasting for two years, brought for the removal of Commissioners, ending in a final judgment having all the characteristics of a final judgment duly made after pleas and replications and articulations of fact : see 27 & 28 Vict. c. 60, ss. 3, 5, and *Code of Civil Procedure*, Arts. 148, 207. It is a question of fact whether this is a final judgment or

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(1) John. 628. 6 Jur N.S. 142

(2) 11 Price, 643 ; see also pp. 667, 668, 679, 695.

(3) 7 Cl. & F. 71, 78.

(4) 7 Cl. & F. 85, n.

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not. Even an order may be a final judgment. See Art. 176 *et seq.*, regarding recusation. Art. 183 provides that such a proceeding is commenced by petition, and an order made thereon is the subject of appeal: see *Guibord's Case* (1), where it was never suggested that an appeal would not lie from such an order. See *Pigeau, Proc. Civ. du Châtelet*, vol. i. p. 370. Although the proceedings were begun by petition, copies thereof were regularly served on the parties; there were pleas, replications, articulations of fact, and other proceedings usual in a suit. Oral testimony was taken, the rules of evidence relating to the testimony of parties to a suit were applied to the Respondents, the case was heard, and judgment pronounced, and that judgment was a final one within the meaning of Art. 1115. If these proceedings were regularly had under sub-sect. 9 of sect. 13 of 27 & 28 Vict. c. 60, they satisfy all possible tests of a final judgment, except that it was made on petition and not in a regular suit. If they were irregular, as clearly was the case with the petition of *Walter Benny* and others, then the Judge has assumed jurisdiction, and decided that a cause of action exists, for which there is no foundation, and then a Court of Appeal has jurisdiction to reverse such order. [SIR BARNES PEACOCK:—What would be the nature of the execution of this judgment according to the Code. The judgment is that the Commissioners be removed, and they are *ipso facto* removed.] A judgment may be the subject of execution in various ways. If there had been an order as to costs that would be executed as part of a final judgment. Suppose it were a judgment removing a trustee, that would be final, though not executed under any particular provisions of the Code. If resisted, it would be carried into effect under such coercive measures as are authorized by the Code: see Arts. 545–8. The general rule is that an appeal lies from a judgment. 34 Geo. 3, c. 6, is the earliest Act on the subject, and it gives a general right of appeal, except in matters too small to be worth it. The common law presumption in *Lower Canada* is in favour of the right to appeal, just as with us it is in favour of a right to a writ of *certiorari*: *Pigeau, Proc. Civile du Châtelet*, vol. i., p. 498, etc. In *England*, no doubt, the right of appeal is chiefly the creation of statute. [Mr. *Fry*, Q.C.:—25 Geo. 3, c. 2, s. 24, regulated the right of appeal previously existing.] See 12 Vict. cc. 37, 38 (*Canada, Acts relating to Lower Canada*). If the Appellants seek to confine appeals to matters of a certain pecuniary amount, the *Code of Civil Procedure* has altered that: see art. 1115. The 27 & 28 Vict. c. 60, s. 13, subs. 12, providing that the Court "shall pronounce the homologation of the report, which shall be final as regards all parties interested, and consequently not open to any appeal," takes away the appeal, not from the homologating judgment, but from the report. See *Pigeau*, vol. i. p. 27. Even if it refers to the homologating judgment, those words cannot take away the right of appeal in another case, such as the present. A special Act does override a general Act unless the special Act is plainly repugnant thereto: see *Stewart* v. *Jones* (1); *Fitzgerald* v. *Champneys* (2); *Bignold* v. *Springfield* (3). This is a matter of practice or procedure in the Courts below, and the Privy Council will not differ from those Courts unless they are shewn to be clearly wrong: see *Boston* v. *Lelièvre* (4). The judgment is an appealable one within the meaning of the Code, whether final or interlocutory: see *Wurtele* v. *Bishop of Quebec* (5); Consol. Stat. c. 88, s. 11. [SIR BARNES PEACOCK referred to sect. 1115 and 1033 of the *Code of Civil Procedure*.] If an interlocutory judgment, although Respondents did not obtain leave to appeal, the other side are not entitled to take the objection. Such formality is not amongst those which are required to be observed on pain of nullity: see Arts. 51 and 165 of the *Code of Civil Procedure*; but the absence of such formality is an irregularity, see *Wardle* v. *Bethune* (6), which may be waived by taking a fresh step in procedure: see *Rossi* v. *Bailey* (7); *Chitty's Archbold's* Practice, vol. ii. 1473 [12th Ed.]; *Oulton* v. *Radcliffe* (8).

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(1) Law Rep. 6 P. C. 157.

Mr. *Fry*, Q.C., replied.

SIR H. KEATING:—Their Lordships will proceed to hear the argument on the merits.

(1) 22 L. J. (Q.B.) 1; S. C. 1 E. & B. 22.

(2) 2 J. & H. 31. 7 Jur N.S. 1006

(3) 7 Cl. & F. 71.

(4) Law Rep. 3 P. C. 157.

(5) 2 Low. Can. Rep. 65.

(6) 6 Low. Can. Jur. 221.

(7) Law Rep. 3 Q. B. 621.

(8) Law Rep. 9 C. P. 189.

Mr. *Fry*, Q.C., and Mr. *Gibbs*, for the Appellant.

The counsel for the Respondents were not called upon.

The judgment of their Lordships was delivered by

SIR HENRY KEATING:—

This is an appeal from the judgment of the Court of Queen's Bench of *Lower Canada* (appeal side), delivered on the 20th of September, 1873, reversing, in favour of the present Respondents, the judgment of the Superior Court sitting at *Montreal* of the 17th of September, 1870, upon a petition of the Appellants. The judgment of the Superior Court stayed the proceedings of the present Respondents, Commissioners in expropriation, and of one *Damase Masson*, their co-Commissioner, and removed the Respondents, replacing them by two other persons mentioned in the judgment. A petition similar to that of the Appellants was presented at the same time to the Superior Court by *Walter Benny* and others, and the judgments, both of the Superior Court and of the Court of Appeal, were delivered on both petitions. Leave to appeal also was granted to all the parties, as well as to the Appellants. There is no appeal lodged by *Walter Benny* and others against the judgment of the Court of Queen's Bench, but the case for the Appellants states that the appeal is prosecuted not only on their own behalf, but on behalf of those parties.

The case turns upon the powers and duties of the Commissioners in expropriation appointed under a statute passed by the Provincial Parliament of the 27 & 28 Vict. c. 60. That Act recites that in consequence of the rapid extension of the city of *Montreal* it became necessary to lay out streets and make other arrangements for the public convenience, and that difficulty and delays were oftentimes experienced in doing so by reason of the defect of the laws then existing. We are informed that the mode of proceeding to expropriate before the Act was to make the valuations by means of the intervention of juries, as with us, in cases where agreements cannot be come to. The Act goes on to give power to the corporation of the city to adopt various ways of making the improvements in question, and to direct whether they are to be paid for out of the funds of the city, or whether the cost is to be assessed upon persons interested in, and benefited by, the improvements. If the council cannot enter into an amicable agreement with the owner of any land which it may be necessary to take for the purpose of those improvements, they are then to proceed in a way pointed out by the Act, viz., that having given public notice of their intention, and a special notice to the owner, they are to apply to the Superior Court, or, if the Court be not sitting, to a Judge of that Court in Chambers, to choose and nominate three competent and disinterested persons to act as Commissioners to fix and determine the price or compensation to be allowed for the property so to be taken; and there is a sub-section which obliges the parties named to accept the nomination under a penalty specified. The Commissioners so appointed are to be sworn, and invested with the powers, and to have the duties, of experts in conducting their valuation. It is their duty to "determine the amount of the price, indemnity, or compensation which they shall deem just and reasonable" for the land to be taken, "or for the damages caused by such expropriation," and they are invested with powers to examine witnesses, to call for deeds, and all other powers necessary for the performance of their office. In case of difference the valuation of the majority is to prevail. There is then the provision upon which this case mainly turns, which is contained in sub-sect. 9 of the Act. That sub-section provides, "If one or more of the said Commissioners at any time after their appointment shall fail in the due performance of the duties assigned to them in and by the present Act, or shall not fulfil the said duties *in a faithful, diligent, and impartial manner*, it shall be lawful for the corporation of the said city, by its attorney, to apply by summary petition to the said Superior Court, or to a Judge thereof, as the case may be, to stay the proceedings of the said Commissioners, and to remove or replace the Commissioner or Commissioners who may have forfeited or violated his or their obligations, and upon such petition the said Court or Judge may issue such orders as may be deemed conformable to justice." Then it goes on to provide, that so soon as the Commissioners shall have completed their valuation they are to give public notice to all parties to come in at a certain time and raise any objections that may occur to them with reference to the valuation so made, and which therefore in some sense may not

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improperly be termed a preliminary valuation, because the Act goes on to say that "It shall be lawful for the said Commissioners to maintain or modify at their own discretion the appraisement so made by them." The Act then provides that the corporation shall submit to the said Superior Court or to one of the Judges the report containing the appraisement of the Commissioners, for the purpose of being confirmed and homologated to all intents and purposes. "And the said Court or Judge, as the case may be, upon being satisfied that the proceedings and formalities hereinbefore provided for have been observed, *shall* pronounce the confirmation and homologation of the said report, which shall be final as regards all parties interested, and consequently not open to any appeal." As to that judgment by homologation therefore any appeal upon it is thus undoubtedly taken away.

The Respondents and a Mr. *Masson* were appointed Commissioners, and they proceeded to value the property of a Mr. *Wilson*, who was the owner of a piece of land which had a double frontage in two streets, *St. Joseph Street*, which it was intended to enlarge, and another street, called *McGill Street*. It was necessary to take a portion of his land for the purpose of widening *St. Joseph Street*, the effect of which would be to diminish the frontage in both streets. The Commissioners proceeded to value under the Act of Parliament, and there was a difference of opinion between them as to the value, Mr. *Masson* making the lower estimate, and the present Respondents making their estimate considerably higher, the higher estimate being $19,500, and the other between $7000 and $8000 dollars only. The Respondents, however, having given the public notice required by the statute, and having certain facts brought before them of which they say they were previously unaware, reduced their estimate to $13,066.

Meanwhile, it was known of course, what their first valuation had been, and this appears to have excited great surprise and disappointment on the part of those who were to be called upon to contribute to the payment; accordingly, petitions were presented to the Superior Court both by *Walter Benny* and others, who were to be contributories, and by the corporation, who are the present Appellants. The petitions were to the Superior Court, and contained charges of very scandalous fraud and partiality upon the part of the two Commissioners who had made the higher valuation, and prayed for their removal and for the appointment of other Commissioners in their place. Their Lordships think it unfortunate that such charges were made, because it turned out there was no ground whatever for them. They were made, however, and the Respondents were called upon to answer them. That they were called upon to answer these charges, and that in a formal way, appears distinctly from the following order of the Court:—"By consent of all parties it is ordered by his Honour Mr. Justice *Berthelot*, that delay be granted to the 4th day of September next, for the said Commissioners to answer the petition of the said *Walter Benny et al.*, and the Mayor *et al.*" Accordingly, they appeared, answered, and pleaded to the petitions in a formal way. To those pleas there were replications, and the case proceeded to issue. The issues having been joined, and an articulation of facts delivered, witnesses were examined on both sides; and after such examination, Mr. Justice *Berthelot* delivered the judgment of the Court. By that judgment, it was decided that the Respondents, although not guilty of the serious charges which were made against them, had in their valuation adopted a principle which was so palpably erroneous that its adoption amounted to a want of diligence that justified the Court in ordering their removal; and accordingly it was ordered that they should be removed and others appointed in their place, and that the valuation of the others should proceed. Thereupon the present Respondents appealed to the Court of Queen's Bench in *Canada*, and the first question that arises is, whether an appeal lay from the judgment pronounced by the Superior Court to the Court of Queen's Bench. That question turns mainly upon the construction of the 1114th and 1115th Articles of the *Code of Procedure*, which embodies the provisions of previous Acts of Parliament.

The 1114th Article of the Code provides, that error may be brought by means of a writ of error against any judgment of the Superior Court, founded upon a general verdict given by a special jury. It must be brought before the Court of Queen's Bench sitting in appeal, and questions of law are only to be argued. The 1115th Article provides, that "an appeal lies to the same Court upon any other final judgment rendered by the Superior Court, except in matters of certiorari." The 1116th Article says: "An appeal also lies from interlocutory judgments in the following cases, when they in part decide the issues, or when they order the doing of anything which cannot be remedied."

It was argued that the decision of the Superior Court was not a final judgment within the meaning of that article of the Code, inasmuch as it was given in a proceeding commenced by petition under the provisions of the Act of Parliament referred to, and had not the incidents of a judgment subject to an appeal, not having been commenced by a writ of summons, the ordinary mode of commencing an action; further that it was not enforceable by writ of execution, but was merely a decision in a matter where the Superior Court had summary and final jurisdiction. It was also contended that inasmuch as the right of appeal from the homologation of the report was taken away, it was not probable that the Legislature intended a proceeding before homologation to be appealable. On the other hand, it is to be observed that the terms of Art. 1115 of the Code are quite general: "Any other final judgment rendered by the Superior Court;" that the decision of the Superior Court is not only in the form of an ordinary *jugement motivé*, which is the form required in a case where the judgment goes by appeal to the Court of Queen's Bench, but it is expressly described as a judgment by the Court which pronounced it. It is true that the cause was commenced by petition, but copies of that petition were regularly served on the parties, they were by the Court called upon to answer, and did so by pleas, to which there were replications, then articulations of facts, and the other proceedings usual in an ordinary suit. Witnesses were called; they were examined and cross-examined on both sides by the advocates of the respective parties, and finally judgment was delivered, declining to give the costs which were prayed for by the petition, but entailing other serious consequences, as well as pecuniary loss, on the Defendants in the suit. The Judges of the Court of Queen's Bench considered that under the circumstances, looking to the real substance, and not merely to the form of the proceedings, the Respondents had the right of appeal from what was to all intents and purposes a final judgment of the Superior Court. They further held that the prohibition of an appeal from the judgment homologating the report was to be confined to the subject-matter to which it applied, and could not be extended inferentially to another and totally different proceeding. It must be borne in mind that the rule of law in this country that an appeal does not lie unless given by express legislative enactment, does not prevail in French or Canadian law, where the presumption is in favour of the existence of what one of the Judges of the Queen's Bench in *Canada*, terms the " sacred right of appeal."

Having regard to these considerations, and to the observations of Lord *Westbury* in the case before this Board of *Boston* v. *Lelièvre* (1), to the effect that upon questions of procedure their Lordships would be slow to reverse decisions by Canadian or other Colonial Courts unless they were fully satisfied that their proceedings were wrong, their Lordships have come to the conclusion that the judgment of the Court of Queen's Bench, so far as it admits the appeal, should be affirmed.

That being so, there remains the question between these parties upon the merits, and their Lordships entertain a clear opinion that the decision of the Court of Queen's Bench was right in reversing the judgment pronounced by the Superior Court.

It is necessary to see upon what ground it really was that the Superior Court pronounced a sentence of removal against the Respondents. They expressed that ground with sufficient clearness. They were of opinion that the Respondents in making their valuation proceeded upon a wrong and erroneous principle, not justified by but contrary to law, and so palpably contrary to law that the adoption of it necessarily shewed that want of diligence which would come within the provisions of the Act of Parliament to which reference has been made. Even if the Respondents had adopted a wrong principle, their Lordships are far from thinking that this would of itself necessarily justify a finding of " want of diligence." But it is unnecessary here to enter upon the discussion which seems to have taken place in the Court below as to the exact meaning of those words, because their Lordships are unable to concur in the view taken by the Superior Court as to the principle to be adopted in the valuation of land to be expropriated under this statute. The Superior Court were of opinion

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(1) Law Rep. 3 P. C. 157.

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that in valuing such land the prospective capabilities of it are not to be taken into consideration; that this is not a legal element in the calculation; that you are to look at the land and what is upon it at the time that the valuation takes place; and that you are not to go into what they are pleased to term hypothetical or speculative inquiries as to what purposes the land might advantageously be applied to. Their Lordships are of opinion that the prospective capabilities of land may form and very often are a very important element in the calculation of its value, and therefore they cannot concur in the view of the Superior Court, which seems to have supposed that that consideration was to be absolutely excluded in a valuation under the Act of Parliament. The learned counsel who argued on the evidence was desirous of shewing that the Respondents carried into effect the principle which they adopted erroneously; but whether they came to a right conclusion upon the figures or made clerical or other errors which might be easily rectified, are matters upon which their Lordships do not feel it at all necessary to give an opinion. The Respondents were removed not for having carried into effect a right principle erroneously, but for having adopted an erroneous principle. Their Lordships consider that the principle adopted by the Respondents was not erroneous, and therefore that the inference of want of diligence drawn from it fails.

On the whole, their Lordships are of opinion that the Court of Queen's Bench were right in their judgment, and will therefore humbly advise Her Majesty that that judgment be affirmed, and that this appeal be dismissed with costs.

Solicitors for the Appellants: *Wilde, Berger, Moore, & Wilde.*
Solicitors for the Respondents: *Freeman & Bothamley.*

[PRIVY COUNCIL.]

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June 30;
July 1, 4;
Nov. 25.

RAM COOMAR COONDOO AND ANOTHER . PLAINTIFFS;

AND

CHUNDER CANTO MOOKERJEE . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Champerty and Maintenance—Agreement to share the Subject of Litigation, when against Public Policy—Non-liability of Stranger to the Record for Costs of Suit, in the absence of Malice and Want of Probable Cause.

The Respondent, as attorney and mooktear of *M.* and his wife, managed actions of ejectment and mesne profits against the Appellants, advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be repaid all advances with interest at 12 per cent., and should have a third part of "the clear net profits" of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the said suits, which, on appeal, were decreed in favour of *M.* and his wife by the High Court, but were afterwards dismissed by the Privy Council with costs, which *M.* and his wife were utterly unable to pay. Pending that appeal, the Respondent purchased the property in suit, and thereafter conducted the appeal in his own interest.

In an action by the Appellants against the Respondent to recover the amount of the said costs, it was averred, but not proved, that the actions were brought or instigated by the Respondent maliciously and without probable cause; and, failing such proof, it was contended, (1), that the agreement and acts of the Respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the Appellants had suffered special damage from them; (2), that the Respondent was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—

Held, that the English laws of maintenance and champerty are not of force as specific laws in *India*.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.

Whatever the rights of the parties to this agreement, it does not constitute a punishable offence, and cannot give to the Appellants, who were strangers to it, a right of action against the Respondent.

Such agreement created no legal privity between the Appellants and the

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* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Respondent from which a promise can be implied on the part of the Appellants to pay the Respondent his costs of the former action, on which an action of contract can be founded; nor does it establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause.

An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause.

Cotterell v. *Jones* (1) approved.

APPEAL from a decision of a Division Bench of the *Calcutta* High Court (May 28, 1874), reversing the decision of *Macpherson*, J. (March 30, 1874), which dismissed the suit of the Appellants against the Respondent.

The circumstances out of which the suit of the Appellants arose are detailed in the judgment of their Lordships.

The agreement of the 17th of July, 1867, which was very lengthy, was executed by *McQueen* and his wife and by the Respondent, and attested.

It recited the title, or alleged title, of the *McQueens* to the land in question, the conveyance by *Beebee Bunnoo* to the father of Appellants, the cesser of the Appellants' title on the death of *Beebee Bunnoo*, and their illegal retention of the land notwithstanding, and that they (the *McQueens*) were desirous of establishing their right to the said land, and recovering the same, but that having no funds wherewith to adopt or commence legal proceedings, they had applied to the Respondent to assist them in commencing and conducting the necessary proceedings, and to advance them sums of money necessary for that purpose until the termination of the suit.

It then recited that the Respondent, in consideration of the covenants, conditions, and agreements therein contained, and of a clear one-third share of what should be recovered by the suit from the Appellants, their heirs, or representatives, "in respect of the said land so illegally held by them as aforesaid," or otherwise in respect of the said proceedings so to be commenced as aforesaid, as and by way of remuneration for his trouble, had agreed to assist the *McQueens*, and to make such payments and advances, and further, "as the said parties hereto of the first part have no means

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(1) 11 C. B. 735.

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whatsoever" to pay to the *McQueens* and the survivor monthly Rs.150 for their support until the final determination of the suit.

The operative part of the deed was in substance as follows:—

The *McQueens* appointed the Respondent their attorney, agent, and mooktear, to institute and prosecute all necessary proceedings against the Appellants, their heirs, or representatives, or any other persons, to sign all documents, receive all moneys, and take possession of all lands to which the *McQueens* might become entitled under any decree and (subject, however, to the consent in writing of the *McQueens*) to compromise suits.

The Respondent then covenanted to commence, conduct, and manage the suits against the Appellants, and make the advances necessary and the monthly payments before mentioned.

It was then declared that the Respondent should in the first place, out of the moneys, or from sale of the land to be recovered from Appellants, retain his advances and disbursements, with 12 per cent. interest, and in the next place, as remuneration for his trouble and risk, retain one-third of the clear net proceeds of such suits after all such payments, with interest as aforesaid, and pay over the other two-thirds to the *McQueens* or the survivor.

The *McQueens* then covenanted not to intermeddle with, but to aid Respondent in the prosecution of the said suits to be commenced as aforesaid, and that so long as Respondent should carry them on and pay the Rs.150 monthly the power of attorney should be irrevocable.

Then followed a proviso that so long as *John McQueen* should give his whole attention to instituting, prosecuting, and bringing to a termination the suits to be instituted as aforesaid, he (*McQueen*) should have the management and conduct thereof, under the control of the Respondent, and the power of attorney should so far remain in abeyance.

It was also provided that if the *McQueens* wished to revoke the said power they might do so on repaying Respondent his advances with interest and Rs.2000, as liquidated damages, and that the indenture should be void in case Respondent failed to make the necessary advances or pay the monthly allowance of Rs.150, and in that case that all advances and payments should be deemed liquidated damages payable to the *McQueens*.

And the *McQueens* were thereby empowered to compromise the suit with the Appellants, but with the consent of Respondent, his heirs, &c., and if the sum accepted should be sufficient to repay the sums advanced by him with interest: and the Respondent was to have one-third of the clear net balance after deducting his advances.

On the 8th of August, 1867, a suit was commenced by and in the name of the *McQueens* in the *Hooghly* Court against the Appellants to recover three beegahs of land. It was dismissed with costs by the Judge of the *Hooghly* Court. In its course the Appellants, having come to knowledge of the above agreement, subpœnaed the Respondent to produce it, which he did, admitting the execution thereof. An application under sect. 73 of Act VIII. of 1859, to add him as a party to the suit, was rejected by the Judge of *Hooghly*, on the ground that the agreement gave him "no present interest." Subsequently the High Court gave the Appellants a decree for possession of the land in question. A writ for mense profits was also decreed in their favour.

On the 25th of June, 1872, the former decree was reversed by Her Majesty in Council; and thereafter the latter was set aside or reversed.

After the decree of the High Court in favour of the *McQueens*, an order for execution was issued on their application, and they were put into possession of the lands in question. On the 10th of July, 1869, the High Court directed the Appellants to be restored to possession (on giving security) unless the *McQueens* gave security for what they might receive pending the appeal and for costs. Thereafter the Respondent gave security on their behalf for Rs.12,000. On the 28th of September, 1871, the Respondent entered into an agreement with the *McQueens* to purchase all their interest in the said lands, and their rights therein, and in the appeal to the Privy Council and in the suit for mesne profits. On the 14th of September, 1872, after the decree of the Privy Council, the Appellants were restored to possession of the land in question.

On the 9th of January, 1873, the Appellants filed their plaint against the Respondent, claiming Rs.25,202 as the loss and damage alleged to have been sustained by them from or by reason of alleged

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wrongful and injurious acts by the Respondent. The pleadings are sufficiently stated in the judgment of their Lordships. On the 30th of May, 1874, *Macpherson*, J. (in ordinary original civil jurisdiction), gave judgment, and while deciding that no malice had been proved against the Respondent, and that it could not be said that there was an absence of reasonable or probable cause for the suits by the *McQueens*, nevertheless decided in favour of the Appellants upon the following grounds:—"Apart from all precedent, and even if it were doubtful whether the agreement of 1867 were actually illegal and void, it seems to me perfectly fair and just that in a case such as this, the Defendant should be held responsible to the Plaintiffs for the loss they have sustained by reason of the suits which the Defendant (substantially for his own benefit) has maintained against them;" adding, "the damages recoverable from the Defendant are those which might have been recovered from the *McQueens* had they been persons of means, and the Defendant had not intermeddled in the suit." He decreed in favour of the Appellants. The High Court in its appellate jurisdiction (*Couch*, C.J., and *Pontifex*, J.), on the 28th of May, 1874, reversed this decree, and dismissed the suit without costs. The Chief Justice said that there was no evidence of malice on the part of the Respondent, and no want of reasonable or probable cause for the action of the *McQueens*, adding: "So far as there is any evidence in the case, I think that there is no ground for holding that an action for malicious prosecution, and without reasonable or probable cause, can be maintained against the Defendant."

Then with reference to the question of maintenance, the Chief Justice said:—

"The case has been presented in the plaint in another form, viz., as an action for what is called maintenance, for maintaining a suit which was brought by *McQueen* and his wife. Now we have to see whether such an action can be maintained in *India*. When we look at the ground upon which it is maintainable in *England*, it will be seen that the cases where it has been allowed will not apply in this country, and cannot be considered as being the law here," and after some reference to the English law he continues:—

"On the same principle an action for maintenance was allowed

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in *England*, but that does not apply to *India*. It has always been admitted that the English common law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply in the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country is that they are contrary to public policy, or, as described by the Judicial Committee in *Fischer* v. *Kamala Naicker* (1), are considered to be immoral and against public policy, and such as the law will therefore not enforce here and will treat as void. But if this is the ground on which agreements of this kind are void in *India*, as I consider it to be according to the decisions on this subject in *India*, and also by the Judicial Committee, it will not enable an action to be brought against the person who maintains the suit. The ground on which an action is allowed in *England*, viz., that the Defendant has been guilty of an offence by which the Plaintiff has suffered damage, does not exist here. When we examine the English law, and see the ground of action there, I think that in this country an action for maintenance cannot be brought. This part of the case of the Plaintiffs in this suit is therefore unsupported."

The Chief Justice also pointed out that if Respondent, as alleged by Appellants, had an interest in the suit under the agreement it could not be treated as void, and that Respondent did no wrongful act, and that the Appellants had simply mistaken their remedy, adding,—

"It appears to me that in this case either the Defendant ought to have been required to be a Plaintiff with *McQueen* and his wife, or that he ought to have been called upon to give security for costs. The Court having erroneously refused to do that, there ought to have been an appeal. The Plaintiffs have omitted to take the course which the law prescribed, and they cannot remedy it by bringing an action when there is no principle of law on which it can be sustained."

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(1) 8 Moore's Ind. Ap. Ca. 170.

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Mr. *Leith*, Q.C., and Mr. *Doyne*, for the Appellants:—

The contract contained in the indenture of agreement of 1867 being clearly champertous, the Respondent thereby made himself in effect and substance a party to the suit interested in its result, and was therefore liable for the costs of and damages sustained by the Appellant, in the same manner as if he had expressly purchased a one-third interest in the subject of suit, and appeared as a co-Plaintiff on the record. The true test of liability is not, as the Chief Justice put it, whether champerty is or is not an indictable offence. The distinction drawn by the Chief Justice, that while champerty is in *England* a criminal offence, in *India* it is not, is immaterial. A champertous agreement constitutes a wrong and an offence, though not a criminal offence, and an action may be brought by the party injured: see *Fischer* v. *Kamala Naicker* (1); *Grose* v. *Amirtamoye Dossee* (2). These cases establish that a speculative bargain of this character, a gambling in litigation, is contrary to public policy, immoral, and void. [SIR MONTAGUE E. SMITH:—The transaction here savours of champerty. But it is not contrary to public policy that people having a good claim should be assisted in some way. That a bargain is unconscionable between the parties, or contrary to public policy, gives no right of action to third parties.] But see *Mulla Jaffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (3); *Soondaree Chowdhrain* v. *The Court of Wards* (4); *Pechell* v. *Watson* (5); *Hilton* v. *Woods* (6); *In re Jones* (7). Under the circumstances of this case the Respondent, being substantially a party to the suit, was liable to be made to pay the Appellants' costs of it which had been occasioned by his wrongful and injurious acts, springing from this champertous and illegal agreement, and he is liable in this suit in the same manner as he would have been in the ejectment suit had he been added as a party, or had it been proved therein that he was substantially and to all intents and purposes the Plaintiff. For under the agreement the *McQueens* denuded themselves of all right and

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(1) 8 Moore's Ind. Ap. Ca. 170.
(2) 4 Beng. L. R. O. J. 1.
(3) 7 Madras H. C. Rep. 128.
(4) 20 Suth. W. R. 446.
(5) 8 M. & W. 691.
(6) Law Rep. 4 Eq. 432.
(7) Law Rep. 6 Ch. 497.

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interest in the property in the suits. It was the duty of the Respondent, as the assignee of all the interest in those suits and property, to have come forward and substituted himself on the record: see *Bamasoondery Dossee* v. *Anundololl Doss* (1). The Appellants unsuccessfully attempted, under sect. 73 of the *Procedure Code*, to bring the Respondent on the record, but it is submitted that their right, admitted as it is by the judgment under appeal to have existed during the pendency of the former suit, to recover from the Respondent the costs and damages to which they have been put by his conduct, was not affected or put an end to by the erroneous refusal of the Judge to grant their application under sect. 73. The Division Bench was wrong in holding that an appeal from that order of refusal should or could have been allowed, and that the non-allowance thereof has deprived the Appellants of their right to relief in this suit. The intention of sect. 73 was to enable persons to put themselves before the Court whose interests were likely to be prejudiced by the result of the suit, but its terms do not extend to proceedings *in invitum*, cases where it is sought to compel an unwilling person to be placed on the record in order that he may be rendered answerable for costs: see *Ridnath Sahoy* v. *Gopee Sahoo* (2); *Kalee Pershad Singh* v. *Joy Narain Roy* (3); *Joygobind Doss* v. *Gouree Pershad Shaha* (4). [SIR ROBERT P. COLLIER:—The section does not seem to me to apply to a case where the object is to substitute a real for a nominal Plaintiff.] No appeal lies for any order under sect. 73: see sects. 315 and 363, and note by Mr. *Broughton* to the latter section in his edition of the *Civil Procedure Code*. [SIR MONTAGUE E. SMITH:—Would there not have been a general equity of the Court either to have put the Respondent on the record or to have restrained proceedings until security was given?] See last section of the Code. There was no power to bring him before the Court under sect. 73, and therefore it could be done under no other authority. The section is chiefly to enable intervenors to bring themselves before the Court: see *Joygobind Doss* v. *Gouree*

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(1) Bourke's Rep. O. C. J. 45; and again on appeal, p. 96.

(2) 14 Suth. W. R. 90.

(3) 11 Suth. W. R. 361, 364.

(4) 7 Suth. W. R. 202.

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Pershad Shaha (1); *Saroda Pershad Mitter* v. *Kylash Chunder Banerjee* (2); *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (3). [SIR MONTAGUE E. SMITH:—If an action lies under the circumstances of this case, sect. 73 does not take it away, expressly or impliedly. SIR ROBERT P. COLLIER:—And if the bargain were champertous and the Respondent took nothing by it, he would not be entitled to be made a Plaintiff. SIR BARNES PEACOCK:—He did no wrong to the Appellants in lending his money at 12 per cent. to the *McQueens;* and unless there was a wrong there could be no foundation for this suit.] See *Bamasoondery Dossee* v. *Anundololl Dos* (4), *Evans* v. *Rees* (5), and cases therein cited. [SIR ROBERT P. COLLIER referred to *Hayward* v. *Giffard* (6), a judgment of Lord *Abinger*, to the effect that the Court might interfere by motion.]

Mr. *Cowie*, Q.C., and Mr. *Bowring*, for the Respondents:—

In order that the Appellants may succeed, one or other of the following propositions must be made out:—1. That there was a champertous agreement amounting to an offence against the law which resulted in special damage to the Appellants, giving them a right of action. 2. That the interest of the Respondent in the unsuccessful suits was of a character which made him if not sole real Plaintiff, at any rate one of the real Plaintiffs; and that he could not be brought on the record or reached under the provisions of the *Civil Procedure Code.*

Taking the second point first, had the Respondent an interest when the *McQueens* first brought their suit. If he had, then champerty and maintenance are at an end. [SIR MONTAGUE E. SMITH:—Not if the consideration for the interest was a champertous one.] No doubt the effect of the agreement is the real point; and according to its true construction it is submitted that the Respondent had an interest in the nature of what a Court of Equity would call a mortgage. The *McQueens* are treated in the agreement as still entitled to the property, but as regards two-thirds of it they

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(1) 7 Suth. W. R. 201.
(2) Ibid. 315.
(3) 9 Suth. W. R. 309.
(4) Bourke's Rep. O. C. J. 45, and on appeal, 96.
(5) 2 Q. B. 334.
(6) 4 M. & W. 194.

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mortgaged it to the intent that the mortgagee should carry on the suit. They could therefore at any time have transferred the mortgage, and thus have eliminated the Respondent's interest so far as the two-thirds were concerned. Here is a partial assignment before action brought; the Plaintiff is an assignor who does not disclose his partial assignment, but pending the suit and before decision, the fact of a partial assignment having been made comes to the knowledge of the Defendants. It was then their business to make an application to the Court (which they did make) that this partial assignee should be made a party to the suit. The Judge refused that application on the ground (perhaps an erroneous one) that the said assignee had no interest. There was a cross appeal by the present Appellants to the High Court against this order; but the High Court in its judgment does not refer to it.

At the hearing of the appeal there was a resettlement of issues, and the parties suggested their issues, and no mention was made of adding the Respondent as a party. It is argued on the other side in reference to sects. 73 and 363 of Act VIII. of 1859, and *Ridnath Sahoy* v. *Gopee Sahoo* (1), that the Courts in *India* are so tied up by legislation that they cannot add a party to the record unless he comes forward as a voluntary intervenor. But every Court has a discretion to say whether the right parties are or are not before it in any given suit; and any order made in the exercise of that discretion must necessarily be open to appeal, for it affects the merits of the suit.

With regard to the first point, no instance can be found in which such an action as the present has been supported except under precisely similar circumstances to those which support an action for malicious prosecution. There is no authority either in *England* or in *India* for the proposition that an action lies against a man merely on the ground that he was substantially the Plaintiff in an unsuccessful suit by which the party complaining has been put to costs and expenses. The ground of such an action as this is not the champertous or maintenous nature of the agreement, but the malice, the misuse or abuse of civil process; the element of champerty is immaterial, except as between the parties to the agreement. Such an action as this was not contemplated in the ancient

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(1) 14 Suth. W. R. 90.

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statute law of this country: see *Statute of Westminster* 1 (3 Edw. 1, c. 25), Revised Edition of Statutes, vol. i. p. 22; *Statute of Westminster* 2 (13 Edw. 1), c. 49, *Ibid.* p. 72; 28 Edw. 1, c. 11, *Ibid.* p. 105. These statutes, which were mostly in the form of answers to petitions, were only declaratory of the common law, which had been neglected or abused. 33 Edw. 1, *Ibid.* p. 111, puts these actions on the ground of malice. See also 20 Edw. 3, c. 4, *Ibid.* p. 172. Then 32 Hen. 8, c. 9, *Ibid.* p. 481, implies that something *malum in se*, corrupt or illegal, must be the ground of the action. See observations thereon by Lord *Coke, Co. Litt.* fo. 368 b, 369 a, and *Comyns*' Digest, tit. "Maintenance," A 5, citing *Coke's* Second Institute, p. 208. See also Year Book, 11 Hen. 6, fo. 11. There is not a trace in the books since 11 Hen. 6, that an action would lie in respect of the abuse of civil process in the absence of those elements which must be averred in an action for malicious prosecution. In *Pechell* v. *Watson* (1), which is relied upon as an authority for this action, there were two counts, (*a*) similar to the ordinary count for instigating a malicious prosecution, (*b*) the holding and maintaining an action already commenced. Both counts were held good. See also *Cotterell* v. *Jones* (2); *Savile* v. *Roberts* (3); *Gregory* v. *Duke of Brunswick* (4). There must be a conspiracy, a wrongful act in pursuance of it, and damage to the Plaintiff. *Savile* v. *Roberts* (3) shews that an action of this kind is not to be favoured. See also *Co. Litt.* fo. 161 a, *Hargreave's* note; *Flight* v. *Leman* (5); *Hawkins*' Pleas of the Crown, vol. i., pp. 454–463; *Findon* v. *Parker* (6). [SIR BARNES PEACOCK:—This suit is in reference to lands situate in the zillah of *Hooghly*, with regard to which no distinction exists as to the legal and equitable title. Courts of Equity have held that the doctrine of maintenance does not apply to suits in Equity.] See *Knight* v. *Bowyer* (7); *Chedambara Chetty* v. *Renga Krishna Muttu Vira Puchaiya Naicker* (8). The statute law of *England* does not apply to the Mofussil. It cannot be said that because this suit happened to come within the local jurisdiction of the High Court,

(1) 8 M. & W. 691.
(2) 11 C. B. 713.
(3) 1 Ld. Raym. 374; see also 1 Salk. 14.
(4) 6 Man. & G. 205.
(5) 4 Q. B. (N.S.) 883.
(6) 11 M. & W. 675, 682.
(7) 2 De G. & J. 421, 443, 4.
(8) Law Rep. 1 Ind. Ap. 242, 264.

therefore the English law of champerty and maintenance is to apply to an agreement relating to lands in the Mofussil, and to proceedings taken in the Mofussil Courts. Both as regards English common law and English statute law, relating to this subject, the question arises whether they are applicable at all. Were they included in the law introduced in 13 Geo. 1. The test is the applicability of such law to the circumstances of the people; and they are no more applicable to Hindus within than to those without the *Mahratta* ditch. Besides, by English law the consequences of a champertous agreement would be the forfeiture of the subject of agreement; and that forfeiture the High Court would have no jurisdiction to give effect to in the case of lands situate at *Hooghly*. [SIR BARNES PEACOCK referred to *Wood* v. *Griffith* (1).] Further, this is a question between Hindus, arising out of a contract, and must be governed by Hindu law, or by equity and good conscience, whether in the Mofussil or otherwise. This is not a champertous contract constituting an offence against Hindu law. Nor can malice be implied by law from the nature of the agreement; it must be proved in fact. See *Grose* v. *Amirtamayi Dasi* (2); *Pitchakutti Chetti* v. *Kamala Nayakkan* (3); *Ramrav Khanderav* v. *Govind Pandshet* (4); *Damodhar Madhavji* v. *Kahandas Narandas* (5); *Dungey* v. *Angove* (6); *Cockle* v. *Whiting* (7).

Mr. *Leith*, Q.C., replied:—

The common and statute law of *England* can only be applied so far as it prevailed in the late Supreme Court of *Calcutta*, whither it was imported by the charter of 13 Geo. 1. The *Mayor of Lyons* v. *East India Company* (8) established that there were exceptions from that importation, viz., where the law was local, or unsuited to the condition of the country. But is there anything in the condition of the people of *India* to exclude the application of the law of champerty and maintenance? That law is based on general principles not confined to English law, or adapted simply to the English people. In 21 Geo. 3, c. 70, s. 17, and Reg. III. of 1793, s. 21, Reg. IV. of 1793, s. 15, there is an omission of "contract"

(1) 1 Sw. 56.
(2) 4 Beng. L. R. O. C. J. 1.
(3) 1 Mad. Rep. 153.
(4) 6 Bomb. A. C. J. 63.
(5) 8 Bomb. O. C. J. 1.
(6) 2 Ves. Jun. 304.
(7) 1 Russ. & My. 43.
(8) 1 Moore's Ind. Ap. Ca. 176.

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from the subjects to be regulated by Hindu law as between Hindus. Then, as regards the English statutes cited on the other side, at common law, before and after those statutes, an action is maintainable on the ground of its being unlawful to enter into an agreement which is champertous, or in maintenance of a suit then pending. In *Pechell* v. *Watson* (1) there was no allegation of want of reasonable and probable cause. It shews that the common law was still in force, and an action could be framed without regard to the statutes. It is a principle not merely of English law, but of general application, that champerty makes an agreement unlawful. The other side have referred to *Madras* and *Bombay* cases, but in *Mulla Jeffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (2), *Holloway*, J., treats the principle as established. Then as regards proving malice in fact, no distinction can be drawn between a man's intention to endamage another, and the thrusting of himself into a suit in which he has no interest, and which results in damage to that other, as a necessary consequence of his conduct. See *Harrington* v. *Long* (3). Such an agreement is a gambling transaction, and has constantly been held to be unlawful by the Courts in *India*. The first case is in 1825, *Ram Gholam Sing* v. *Keerut Sing* (4). Then comes *Brijnerain Singh* v. *Teknerain Singh* (5); *Zuhooroonnissa Khanum* v. *Russick Lal Mitter* (6); *Syed Keramut Ali* v. *Sumbhoonath Mitter* (7); *Maharajah Mohessur Buksh Singh* v. *The Government* (8); *Andrews* v. *Maharajah Sreesh Chunder Raee* (9); *Kishen Lal Bhoonick* v. *Pearee Soondree* (10); *Panchcourie Mahtoon* v. *Kalee Churn* (11); *Sheikh Abed Hossein* v. *Lalla Ram Sarun* (12); *Juggessur Coowar* v. *Prossono Coomar Ghose* (13); *Grose* v. *Amirtamayi Dasi* (14).

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The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This suit was instituted by the Appellants, who were the successful Defendants in two former suits brought by one *McQueen* and his wife against them, to recover from the Defendant, *Chunder Canto Mookerjee,* who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which *McQueen* and his wife, by reason of their poverty, were unable to pay.

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(1) 8 M. & W. 691.
(2) 7 Mad. H. C. 128.
(3) 2 My. & K. 590.
(4) 4 Select Rep. 12.
(5) 6 Select Rep. 131.
(6) 6 Select Rep. 298.
(7) S. D. A. 1847, 423.
(8) S. D. A. 1848, 659.
(9) S. D. A. 1849, 340.
(10) S. D. A. 1852, 394.
(11) 9 Suth. W. R. 490.
(12) 13 Suth. W. R. 427.
(13) 1 Ind. Jur. (N.S.) 282.
(14) 4 Beng. L. R. 1.

The principal suit of the *McQueens* (the other being for mesne profits only) was brought in the *Hooghly* Court to recover from the present Plaintiffs some lands in *Hooghly,* which their father had purchased of one *Bebee Bunnoo.*

Mrs. *McQueen* was the illegitimate daughter of one *McDonald* and *Bebee Bunnoo,* and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now Plaintiffs in that suit was that *Bebee Bunnoo* was either the real owner, or had been allowed by *McDonald* to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty-four years after the purchase, and had greatly improved it.

The principal Sudder Ameen held the suit to be barred by limitation, and dismissed it. The High Court (finding that *Bebee Bunnoo* had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then Plaintiffs, the *McQueens.*

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then Defendants (the now Plaintiffs) should have their costs in *India,* and of their appeal to Her Majesty.

These costs amounted to a large sum, and the *McQueens* were unable to pay them.

The connection of the Defendant *Mookerjee* with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the *McQueens* and *Mookerjee,* which recited an apparently good title of the former to the property. By this agreement *Mookerjee* was appointed the attorney and mooktear of the *McQueens* to conduct the litigation against the present Plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs.150 per mensem to the *McQueens* for their support during the pendency of the proceedings. On the other side they agreed in effect that *Mookerjee* should have the management of the suit, they however assisting him, unless it happened that *McQueen* could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of *Mookerjee*."

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, *Mookerjee* should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the *McQueens*.

This power of attorney was made irrevocable, unless upon the terms that the *McQueens* should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs.2000 as liquidated damages.

McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by *Mookerjee*.

It appears that after the present Plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the *McQueens* obtained possession of the property. The Court having ordered the possession to be restored, unless the *McQueens* gave security to the amount of Rs.12,000 to repay what would be due in case the decree should be reversed, the present Defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, *Mookerjee* purchased of the *McQueens* all their interest in the principal suit, and the suit for mesne profits, for Rs.22,000, out of which he was to deduct Rs.12,000 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that in the former suit the now Plaintiffs—upon the agreement between *Mookerjee* and the *McQueens* coming to their knowledge—applied to the Judge to have *Mookerjee* made a party to the suit under the 73rd clause of Act VIII. of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the *McQueens*, the present Plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the Plaintiffs being in lawful possession as owners of the property in question, the Defendant, knowing this was so, maliciously conspired with the *McQueens* to bring a suit in their names to take the possession from him, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the *McQueens*, and that it " savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the Plaintiffs," in the names of persons who had no right, and were without means to pay the costs. It then avers that the former suit was brought " maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts shewing the Defendant's connection with them, alleges that "the litigation was instigated and carried on by the Defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the Defendant, maliciously and without probable cause, had been proved, this action would undoubtedly have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice *Williams* in *Cotterill* v. *Jones* (1):—

"It is clear no action will lie for improperly putting the law in

(1) 11 C. B. 735

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motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Courts in *India* on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the Defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the Plaintiffs. The terms of the agreement, and his large expenditure, shew that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the *McQueens*, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then Plaintiffs. Indeed, it was properly admitted at their Lordships' Bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the Bar, which, stating them generally, are:—

1. That the agreement and acts of the Defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the Plaintiffs have suffered special damage from them.

2. That the Defendant was the real actor in the former suits and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in *England*, have been introduced into and form part of the law of *India*, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the Bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper Plaintiff, in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. (*Ram Gholam Sing* v. *Keerut Sing* (1)).

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. (*Brijnerain Sing* v. *Teknerain Sing* (2)).

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. *Tucker*, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases." (*Zuhooroonissa Khanum* v. *Russick Lal Mitter* (3)).

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the Plaintiffs." (*Andrews* v. *Maharajah Sreesh Chunder Raee* (4)).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court consisting of five Judges, in which the Principal Sudder Ameen had dismissed a suit because the Plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir *R. Barlow* says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the Plaintiffs." Mr. *Welby Jackson*, whilst he thought the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that as between a Plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognise and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." (*Kishen Lal Bhoonick* v. *Pearee Soondree* (1)).

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(1) 4 Select Reports, 12.

(2) 6 Select Reports, 131.

(3) 6 Select Reports, 298.

(4) S. D. A. 1849, Beng. 340.

This case appears to have been generally regarded as a leading decision. Mr. Justice *Glover* so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal: *Panchcouree Mahtoon* v. *Kalee Churn* (2). In this same case, however, Mr. Justice *Macpherson* said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in *India* in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and Another* v. *Amirtamayi Dasi* (3), which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice *Phear*, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in *England* is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in *India*, and therefore, on grounds of public policy, void. Upon an appeal to the full Court, the Chief Justice (Sir *Barnes Peacock*) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice *Macpherson* agreed with Mr. Justice *Phear* in thinking that the agreement was void, as being against public policy.

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(1) S. D. A. 1852, Beng. 394.

(2) 9 Suth. W. R. 490.

(3) 4 Beng. L. R. 1.

Mr. Justice *Holloway* in a case which came before the High Court of *Madras* in its original jurisdiction in 1870, expressed a strong opinion that the English statute and common law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice *Holloway* on the application of the English statute and common law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it. (*Mulla Jeffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (1)).

This opinion of Mr. Justice *Holloway* seems to be directly opposed to the view expressed by Chief Justice *Scotland* in delivering the opinion of the High Court of *Madras* in a former case (*Pitchakutti Chetti* v. *Kamala Nayakkan* (2)). The Chief Justice there says:—"Maintenance and champerty are made offences by the common and statute law of *England*, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law

(1) 7 Mad. H. C. R. 128.

(2) 1 Mad. H. C. R. 153.

can properly be applied in perfect consistency with the Hindu law relating to contracts. (See 1 *Strange's* Hindu Law, p. 275.)"

The passage in *Strange* alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of *Bombay*, *Damodhar Madhavji* v. *Kahandas Narandas* (1), *Westropp*, C.J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the Mofussil.

To return to the *Bengal* Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soonduree Chowdhrain* v. *The Court of Wards* (2), the Court (Sir *R. Couch* being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer* v. *Kamala Naicker* (3). He also referred with approval to the remarks of Mr. Justice *Holloway* as to the mischievous effects of such agreements in *India*.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice *Macpherson* was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell* v. *Watson* (4), that the present suit might be maintained.

In the judgment of the High Court delivered by Sir *R. Couch*, C.J., reversing Mr. Justice *Macpherson's* decree, the Chief Justice says: "It has been always admitted that the English Common Law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply to the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 *Moore*), are considered to be immoral and against public policy and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in *India* so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in *England*."

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(1) 8 Bomb. H. C. Rep. O. J. 1

(2) 20 W. R. 446.

(3) 8 Moo. Ind. Ap. Ca. 170.

(4) 8 M. & W. 691.

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In the case reported in the 8th *Moore*, the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and this being so, their Lordships observed: "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law and partly by statute, are forbidden." But in the course of the judgment they made the following observations: "The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in *England;* but they have been properly regarded in *India* as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

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In the more recent case before this tribunal, *Chedambara Chetty* v. *Renga Krishna Muttu Vira Puchaiya Naickar* (1), in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made :—

"With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England*. The statute of champerty being part of the statute law of *England*, has of course no effect in the Mofussil of *India*; and the Courts of *India* do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts of *England*. On the other hand the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in *India*; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the Mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the Mofussil has not been always borne in mind.

It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to

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(1) Law Rep. 1 Ind. Ap. 241.

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act in this manner. Before the acquisition of *India* by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in *England* in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of *India*, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from *India* of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons* v. *The East India Company* (1). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the Defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the Mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the Mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into *India*, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

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(1) 1 Moore's Ind. Ap. Ca. 176.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in *India*, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the *McQueens* if their suit had been successful; but assuming this to be so, the Plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the Defendant for the losses and costs of the litigation. By the law of *India*, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding

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that the action of the Plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the Defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of the first impression, no precedent for it having been found either in *England* or *India*. It may be assumed that, under the first agreement, the Defendant acquired a contingent interest in the property the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, *McQueen* was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the Defendant, subject to a power of revocation by the *McQueens* on onerous terms, which was not exercised. But this state of things created no legal privity between the Plaintiffs and the Defendant, from which a promise can be implied on the part of the Defendant to pay the present Plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shewn, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or by the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the Plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now Plaintiffs were fully aware, during the pendency of the former suit, of the arrangement

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between the *McQueens* and the Defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-Plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in *England*, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *In re Jones* (1). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward* v. *Gifford* (2). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in *Calcutta* was much relied on by the Appellant's counsel: *Bamasoonduree Dossee* v. *Anundolal Bose* (3). There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal Plaintiff, Mr. Justice *Phear*, on a motion, made apparently in the suit, ordered the real Plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir *Barnes Peacock*) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice *Phear's* judgment rests, but on the circumstances of the case, which shewed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the Plaintiffs that if the costs in *India*

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(1) Law Rep. 6 Ch. 497.

(2) 4 M. & W. 194.

(3) Bourke's Rep. O. C. J. 45; and on appeal, p. 96.

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were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the Defendant, pending that appeal, of all the rights of the *McQueens* in the property and the suit. Undoubtedly the *McQueens* after this purchase became nominal Appellants only, and the claim of the Plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law administered in the Mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind, and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions.

The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the Plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordship also think the Defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

Solicitor for the Appellants: *J. H. Wrentmore.*
Solicitors for the Respondent: *Clarke, Rawlins, & Clarke.*

[HOUSE OF LORDS.]

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Feb. 16, 19, 20.

HENRY THOMSON AND OTHERS . . . . APPELLANTS;

AND

GEORGE J. EASTWOOD (ADMINISTRATOR OF JAMES ROBERT EASTWOOD, DECEASED), AND OTHERS . . . . RESPONDENTS.

Will—Express Trust—Delay—Deed—Charge of Fraud—Costs.

The *Statute of Limitations* does not apply to an express trust for a legacy, yet where the beneficiary or his representative has allowed a very long time to elapse without attempting to enforce the trust, Equity will, when enforcing it, apply, as to interest on the legacy, the principle of the statute.

7 Ch D 7
4 App Cas
55

A legatee in a will was described as "*J. E.*, the son of *S. E.*, by *M. J.*, or *M.*, or *E.*, his wife." There being no doubt as to the identity of the person intended, the question whether he was the son born in lawful wedlock or not, was utterly immaterial, for he was the person designated as the legatee.

If on the footing of a supposed illegitimacy the title of the *cestui que trust* to the legacy is disputed and denied by the trustee, and the former is thereby induced to accept from the trustee a smaller sum than that to which he is entitled under the will, and by deed to release the trustee from the payment of the legacy, Equity will not permit such a transaction to stand.

Even without any evidence of fraud, such a transaction is null and void.

Where there is upon the face of a bill that which will give a right to relief in Equity, that right will not be affected by the circumstance that there are also in the bill allegations of personal fraud, which might give a farther or a different right to relief, if they were proved. If they are not proved the proper course is to dismiss, with costs, so much of the bill as is founded on them, but not to dismiss the bill itself.

A trustee who, on untenable grounds, withholds trust money from his *cestui que trust* may commit what in Equity may be considered a fraud, without being chargeable with personal fraud.

A legacy was given on an express trust in 1807; it was not paid to the original legatee. He became insolvent, released the legacy, and died. His only child came of age in 1849. Litigation on matters connected with the legacy, but not upon a direct claim to it, was going on in 1865. *A.* took an assignment of the legacy, and also became the administrator of the original legatee's estate, and the assignee under his insolvency; in 1872 he filed a bill to enforce payment of the legacy with interest. He was held entitled to the assistance of a Court of Equity in respect of it.

A will, in 1807, began thus: "I hereby appoint my after-named executor, *Charles E.*, my youngest brother, to be trustee for the following legacies." Several were then named, and the will went on, "Considering that money

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will be more essential to my dear brother *Samuel E.* than a distant possession of land, I bequeath to *Samuel E.* during his natural life the interest of £3000, and, after his death, to his eldest son, *James E.*, by his last wife, *Margaret J.*, or *M.*, or *E.*, till he attains twenty-one, and then to obtain the principal. I order that my youngest brother *Charles E.* shall be liable to all my lawful debts of every description, and pay them as soon as he can, and also pay my legacies when regularly due, and all expenses, &c.; and to enable him to do all this, I bequeath, unconditionally, to him all my estates and landed property, with all emoluments belonging to them, in the county of *Armagh;* I also bequeath to him, the said *Charles*, all my estates, &c., with all their emoluments, in the county of *Louth*, or elsewhere," &c.:—

Held, that the will constituted an express trust, so as to prevent the *Statute of Limitations* applying to it. Payment of the legacy with interest was therefore directed.

But, there having been no proceedings taken until 1872 with the direct purpose of enforcing payment of the legacy, (though other proceedings connected with the will had been going on,) and the estates having passed into the hands of the representatives of the original trustee, the interest on the legacy was, in the discretion of the House, directed to be calculated only from six years before the filing of the bill.

Quære, whether, on the words of the above will, the estate in the county of *Louth* was, like the estate in *Armagh*, subject to the trust for payment of the debts and legacies. As its liability to the trust had never been made the subject of dispute, and the Courts below had proceeded on the assumption that it was so liable, this House did not interfere with the decision in that respect.

The word "unconditionally," as used in this will, did not mean without any condition annexed to the payment of the legacies, but that the trustee was made absolute owner of the fee simple for the purpose of doing what the testator had ordered.

THIS was an appeal against a decision of the Court of Appeal in Chancery, in *Ireland*, dated the 18th of June, 1875, by which a previous decision of the Master of the Rolls in *Ireland* had been reversed.

The Rev. *James Eastwood*, of *Castletown*, in the county of *Louth*, was possessed of certain estates in the counties of *Armagh* and *Louth*, and made his will, dated the 22nd of December, 1807, which contained the following provisions:—"I hereby appoint my after-named executor *Charles Eastwood*, my youngest brother, to be trustee for the following legacies: . . . . Item. Considering that my *Armagh* estate is deeply loaded with debts, and considering that money would be more essential to my dear brother *Samuel Eastwood* and his family, residing in *Dublin*, than a distant possession of land, I bequeath to my said eldest brother *Samuel*, during his natural life, the interest of £3000, and, after his death, to his eldest son, *James Eastwood,* by his last wife *Margaret Javoux,* or *Moron,* or *Eastwood,* till he attains the age of twenty-one, and then to obtain the principal, and in case of the said *James Eastwood's* death before that age, then to go to the rest of the said *Margaret's* children by said *Samuel;* provided, however, that neither *Samuel Eastwood* nor any person of all his families, ever dispute, or attempt to invalidate by any means, this my last will, or any part thereof; if they do, then the legacy of £3000 and all interest are immediately to cease, and be for ever void, and return to my youngest brother *Charles Eastwood,* and his heirs, otherwise to be in full force according to the tenor of my arrangement already expressed." He gave several other legacies, and then said: "All these legacies to commence their respective interests from the day after my decease, and the principal sums to be paid according to my statement." The will went on thus: "I order that my youngest brother *Charles Eastwood* shall be liable to all my lawful debts of every description, and pay them as soon as he can, and also pay my legacies when regularly due," and all expenses, &c., "and to enable him to do all this, I bequeath, unconditionally, to him all my estates and landed property, with all emoluments belonging to them, in the county of *Armagh;* I also bequeath to him, the said *Charles,* all my estates, leases, and landed property, with all their emoluments, in the county of *Louth,* or elsewhere (if any); I bequeath to him said *Charles* all my buildings, cattle, plate, books, and furniture, and all property that I shall die possessed of, &c., and I appoint him my residuary legatee" and executor.

The testator died on the 23rd of February, 1808, and the will was proved by *Charles Eastwood* on the following 31st of March. *Charles Eastwood* entered into possession of the estates, and paid the interest on the legacy to *Samuel Eastwood* up to the death of the latter in 1824. The legacy itself was then claimed by *James Robert Eastwood* (then about twenty-six years of age) as the eldest son of *Samuel.* This claim was resisted by *Charles,* who asserted that *James Robert* was not the legitimate eldest son of *Samuel. James Robert* took no steps to enforce his claim during the life of

Charles, who died in 1830. Upon the death of *Charles*, his son *James Eastwood* entered into possession of the estates as his heir-at-law. Then *James*, like his father *Charles*, and for the same reason, disputed the claim of *James Robert* to the legacy. *James Robert* carried on business at *Dundalk*, in the county of *Louth*, as a farmer, and jaunting-car proprietor; he also held an office in the Civil Bill Court of that county. He fell into embarrassments, and on the 10th of April, 1832; he filed a petition under the then Irish *Insolvent Act*. In this petition he set forth his earnings and profits during the preceding four years at about £780, and stated the causes of his insolvency to be "losses and heavy expenses." In the description of his property he asserted in the two following sentences his rights under the will: "Insolvent is entitled under the will of the Rev. *James Eastwood* to the sum of £3000, and about eight years' interest, arising out of lands in the counties of *Louth* and *Armagh*." "Insolvent also claims to be entitled to an estate situate in the counties of *Armagh* and *Louth*, which was left him by *John Eastwood*, deceased, his grandfather, yielding about the sum of £2000 per year, as by copies of the wills filed in this Court will appear."

Samuel Scott Eastwood (one of the various Respondents) was appointed assignee under this insolvency of *James Robert*.

On the 1st of February, 1833, *James Robert Eastwood* executed a deed, being party thereto of the first part, to which *Samuel Scott Eastwood*, his assignee under the insolvency, and *John James Bigger*, one of his principal creditors (and a relative), were also parties of the second and third parts, and *James Eastwood* (the son of *Charles*) of the fourth part, which deed recited *James Robert's* claim to be the eldest son of *Samuel*, and as such to be entitled to the £3000 legacy, and that "*Charles Eastwood* during his life disputed the validity of the said bequest of the said principal sum of £3000, and insisted *James Robert* was not the person so named and described in the will, nor in any way entitled to receive the said legacy." It then recited the seisin of the estate by *James*, the son of *Charles*, and that he, in like manner, had disputed the right of *James Robert*; and that *James Robert* had become insolvent, and had filed his petition, and that *Samuel Scott Eastwood* had been appointed assignee, and it proceeded thus:

"And whereas the said *Samuel Scott Eastwood* and *John James Bigger*, testified by their being parties to and respectively executing these presents, have, respectively, proposed to the said *James Eastwood*, party hereto, to relinquish and give up all claims and demands on foot or upon account of the said legacy of £3000, and all interest thereof, on being paid the sum of £300 sterling by the said *James Eastwood*, and the said *James Eastwood*, being desirous of putting an end to such claims and demands, and to avoid the expense and trouble of litigating the same, should any attempt be made on the part of the said *James Robert* and *Samuel Scott Eastwood*, or either of them, or any person or persons claiming by, from, through, or under them, or either of them, to establish such claims or demands, has agreed to such proposal." The payment of the £300 was then stated, and then *Samuel Scott Eastwood* and *James Robert Eastwood*, with the consent and approbation of *John James Bigger*, released the several and respective executors and administrators of the Rev. *James Eastwood* and *Charles Eastwood*, their lands and tenements, &c., and also *James Eastwood*, party thereto, his heirs, executors, &c., from the legacy or sum of £3000, and all interest therein, and all right, title, and interest of them the said *Samuel Scott Eastwood* and *James Robert Eastwood*, or either of them thereto.

The payment of the £300 was indorsed on the deed, which was duly registered on the 18th of April, 1833.

James Robert Eastwood died in 1835, leaving his daughter *Maria Louisa Eastwood* his sole next of kin. She came of age in 1849.

James Eastwood died in December, 1865, without issue, and the Appellant *Thomson* is the trustee under his will. That will, which assumed to dispose of the *Armagh* and *Louth* estates, was in 1865 disputed in the Court of Probate by *Maria Louisa Eastwood*, who claimed to be heiress-at-law, and as such entitled to the estates. Her title as such was disputed on the ground of the illegitimacy of her father *James Robert Eastwood*, and the Judge of the Court of Probate declared that illegitimacy to be established. But his decision was reversed by the Court of Appeal in Chancery on the 9th of July, 1867. An appeal against that reversal was presented to this House, but was dismissed for want of prosecution in November, 1867.

In 1872, *George Joseph Eastwood* (who had previously obtained an assignment of all *Maria Louisa Eastwood's* interest in the legacy of £3000, and had by the Insolvent Debtors Court been substituted for *S. Scott Eastwood* as assignee of the effects of *James Robert Eastwood*), took out letters of administration to *James Robert Eastwood*, and then filed his bill against *Thomson*, the trustee of *James Eastwood*, and against all other necessary parties, and after setting forth all the facts, alleged that a trust was created in the estates of the Rev. *James Eastwood* to the extent of the charge of £3000; that the statements in the deed of 1833 were false and fraudulent; that the parties had contrived to have *Samuel Scott Eastwood* appointed assignee of the insolvent's estate; that the execution of the deed was obtained by undue influence and coercion used by *John James Bigger* and *S. Scott Eastwood* in collusion with *James Eastwood*. The bill prayed that the legacy of £3000 and interest might be declared well charged upon the estates, that the deed might be set aside as fraudulent and void, and, under the circumstances, as an unconscionable transaction, and as obtained from *James Robert Eastwood* by coercion and pressure when he was in insolvent and embarrassed circumstances; and for an account, and general relief.

The Defendants filed their respective answers in May and June, 1872, and submitted that no express trust was created for the payment of the legacy of £3000; that the deed of 1833 was given for valuable consideration, and was binding on *James Robert Eastwood* and the persons claiming under him, being a *bonâ fide* compromise of a disputed claim. The answer denied all charges of fraud, collusion, and undue influence, and alleged the great lapse of time and the laches and acquiescence of *James Robert Eastwood*, and of those claiming under him, submitting that, even if an express trust had been created by the will, it had been terminated by the deed of release, and that the claim was now barred by the effect of the *Statute of Limitations*. Evidence was taken on both sides, and on the 5th of December, 1874, the Master of the Rolls pronounced a decree dismissing the Plaintiff's bill with costs.

This decree was, by the order of the Lord Chancellor of *Ireland* and the Lord Justice of Appeal, reversed.

The case was then brought up to this House.

Mr. *Law*, Q.C. (of the Irish Bar), and Mr. *Cotton*, Q.C. (Mr. *H. Madden*, of the Irish Bar, with them), for the Appellants:—

The first question here, is, whether as this is a grant of landed property for the payment of debts and legacies by name, the *Statute of Limitations* can be applied to it. It is submitted that the statute does apply, for the will created only a legal debt, and the recovery of that legal debt was not only barred by the release executed in the year 1833, but it was also barred by the operation of the statute.

As to the question of an express trust—it is submitted that there is no such trust here. There may be a grant of property with an intent to accomplish a particular purpose, without an express trust being thereby created: *Meredith* v. *Heneage* (1). The will here does not grant the estate on an express trust as in *The Attorney-General* v. *The Wax Chandlers' Company* (2), where the gift was expressed to be "for the intent and purpose and on the condition" of doing what was desired, but merely contains the declaration of the testator that "in order to enable" the devisee to pay debts and legacies, the estate is granted. Supposing, however, that a trust is created, though, as such, it may be exempted from the operation of the statute, it will be affected by laches on the part of the beneficiary, for the rule of Equity is distinctly opposed to stale demands: *Bright* v. *Legerton* (3); *Harcourt* v. *White* (4). What is the rule of law is adopted as a principle for administering equity. This was originally a debt at law, payment of it might have been enforced—it was not enforced—the statute operated upon it, and when that was so, it could not be revived, not even by a devise creating an express trust for it: *Burke* v. *Jones* (5). After a less delay than has occurred here, a bill by a client to avoid a purchase made from him by his solicitor, was dismissed: *Champion* v. *Rigby* (6).

Here too, there was not merely lapse of time, but there had been a deed of release executed by the person entitled to a life interest on the legacy. No fraud was really imputable as to that deed, and fraud being out of the way the deed operated as a valid

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(1) 1 Sim. 542.
(2) Law Rep. 6 H. L. 1.
(3) 2 De G. F. & J. 606. 7 Jur. N.S. 559
(4) 28 Beav. 303. 6 Jur. N.S. 1087
(5) 2 Ves. & B. 275.
(6) 1 Russ. & My. 539.

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compromise of the claim: *Cook* v. *Wright* (1). The compromise was made upon a good consideration with relation to a disputed claim, and that being so it was to be treated as valid: *Callisher* v. *Bischoffsheim* (2). There is no pretence here for charging fraud or coercion, or undue influence, for *James Robert Eastwood* was a man in the vigour of life, he was in business, and he was besides, in some way connected with the Civil Bill Courts in *Ireland*, and must, therefore have known something about legal proceedings. He was neither so young nor so inexperienced and ignorant as to require the sort of protection now assumed to have been necessary for him.

The dismissal of the bill here was correct. The bill rested upon fraud and collusion, but there was no evidence to support the charge, and when that charge failed the Plaintiff was not at liberty to eke out from other circumstances a claim to relief. As he had put his case upon fraud and failed to shew fraud, his demand for relief failed altogether: *Luff* v. *Lord* (3). And this rule was the more required to be applied here because of the great delay which had taken place, and which had deprived the Defendants of the evidence of persons now dead, but who, if alive, would have been able to shew the good faith of the whole transaction. *James Robert* himself, a man of full age, of competent knowledge, and of business habits, had never taken any steps to set aside the deed, which it was now said he had been entrapped into executing. And though his daughter was an infant when he died, yet she came of age in 1849, and afterwards contested the will of her uncle, and set up her own claim to the estate itself, in direct opposition to the will (which was an act that really incurred the forfeiture of the claim to the legacy), shewing thereby that she had the spirit and the means to assert her rights, yet even she had never impeached the deed as fraudulent. It was too late for her mere assignee now to do so.

Then came the question whether, even supposing an express trust had been created, that could affect a person who succeeded to the land some years afterwards, and had never been designated as trustee. Where the original party was dead, a short space of time constituting the period of delay had been allowed to protect the parties who claimed under him: *Gregory* v. *Gregory* (1). So in *Roberts* v. *Tunstall* (2) a delay of fifteen years was held sufficient to bar the right to impeach a conveyance under which the Defendant claimed, but to which he had not been a party, though the Plaintiff filing the bill was the assignee of an insolvent estate, and was asserting a right for the benefit of creditors, and the poverty of the original vendor was not allowed to be a sufficient excuse for the delay. *Carey* v. *Cuthbert* (3) is a decisive authority against the present claim.

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(1) 1 Best & S. 559; 30 L. J. (Q.B.) 321.

(2) Law Rep. 5 Q. B. 449.

10 Jur N.S. 1248 (3) 34 Beav. 220.

This is a mere legacy, or at most, only a sum of money charged upon land, and no interest having been paid on it for above twenty years it must be treated as coming within the 40th section of 3 & 4 Will. 4, c. 27. *Burrowes* v. *Gore* (4) does not affect this case, for there is no express trust here. There are no circumstances of fraud here, as in *Pickett* v. *Loggon* (5), so that there is no ground for sustaining this bill, but even there it is to be observed, that though the bill was sustained and an account ordered, the account was limited to the time of filing the bill. The decree below extending it back for many years, is clearly erroneous: *Marshallen* v. *Marum* (6). Here, however, the chief charge of the bill was fraud; that cannot be supported, there is no evidence to justify it, and the bill is now sought to be sustained on other grounds. Such a course of proceeding cannot be permitted, and the bill ought to be dismissed.

The words of the will, even if construed to create a trust, can have no application to the *Louth* estate, but are confined to the estate of *Armagh*.

Mr. *Butt*, Q.C. (of the Irish Bar), and Mr. *Fry*, Q.C. (Mr. *J. Adair Phillips*, of the Irish Bar was with them), for the Respondents:—

There is clearly an express trust here. The gift distinctly creates one, and the person taking the estate is bound to give effect to the gift. There is a clear declaration of acts to be done by

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(1) G. Coop. 201; affirmed Jac. 631.

(2) 4 Hare, 257; 14 L. J. (Ch.) 184.

(3) Ir. Rep. 7 Eq. 542.

(4) 6 H. L. C. 907. 4 Jur. N.S. 1245.

(5) 14 Ves. 215.

(6) 3 D. & War. 317.

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the devisee; he is named as the person entrusted to do them, and it is to enable him to discharge the trusts thus imposed upon him that he is made the devisee of the estate, which is given him "unconditionally," that is, unfettered by restrictions, for that purpose. Where the gift is an express one, and the person taking the estate is bound to give effect to it as a trustee, as he is here, it is an express trust: *Commissioners of Charitable Donations* v. *Wybrants* (1). And the same case shews that the *Statute of Limitations* has, under such circumstances, no operation. This being a trust, the *cestui que trust* did not lose his right merely because, while litigation was proceeding on another matter connected with it, he had not taken any steps to enforce the execution of the trust: *Life Association of Scotland* v. *Siddal* (2). Lord Justice *Turner*, in that case (3) shews that a person who assumes to act as a trustee, though not legally possessing that character under the will, becomes liable to the trust. The representative of *Charles* and of *James Eastwood* (who is in actual possession of the estates originally devised) has done so here, and is liable. Mere length of time does not necessarily operate, as against a *cestui que trust*, as acquiescence in the non-performance of the trust. Where there was an existing trust fund an apparent acquiescence even of forty years' duration was held not to bar the right of the beneficiary to the full benefit of the trust: *Mills* v. *Drewitt* (4). Being an express trust the *Statute of Limitations* is not applicable: *Mutlow* v. *Bigg* (5). So strictly is this principle applied that even where in the case of a director of a company there was a fiduciary relation between him and the company, he was held unable to make a profit to himself from the business of the company: *Imperial Mercantile Credit Association* v. *Coleman* (6). Here was the case of volunteers taking an estate granted on an express trust, and then attempting to set up delay in enforcing the trust as a reason why it should not be enforced at all. Every principle of Equity relating to the execution of trusts was opposed to such an attempt.

The allegation of fraud is not the only ground on which this bill is filed. Relief is sought on the other ground, that here is a trust fund, still in existence, and not administered; and the bill seeks that the trust may be carried into effect by the application of that fund. The charge of fraud is only one part, and that but an incidental part, of the bill, and even if that charge of fraud should be held not to be made out, full relief ought to be given as to the other part of the bill. The failure to make out the fraud only affects the costs: *London Chartered Bank of Australia* v. *Lemprière* (1).

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(1) 2 J. & Lat. 182.
(2) 3 De G. F. & J. 58. 7 Jur. N.S. 785
(3) At p. 72. 7 Jur. N.S. 786.
(4) 20 Beav. 632. 1 Jur. N.S. 816.
(5) Law Rep. 18 Eq. 246; see S. C. 1 Ch. D. 385.
(6) Law Rep. 6 H. L. 189.]

Where there is an express trust with relation to certain property, and that trust is not discharged, but the trustee is found in wrongful possession of the property, he is bound to account for the whole period of time during which his possession has continued: *Hicks* v. *Sallitt* (2). Here the trustee, as the means to evade the performance of his trust, put forward a *suggestio falsi*, setting up, without justification, illegitimacy on the part of the *cestui que trust*, and then because of the delay to enforce the claim—a delay occasioned by this false suggestion—tries to be freed from his clear liability as trustee. The delay is no answer to the claim, because the trust is express, but if a delay could, in any way, be set up as an answer, it must be because the *cestui que trust* was fully informed of all the circumstances of the case, and with that full information in his possession, delayed the enforcement of his right: *Life Association of Scotland* v. *Siddal* (3). That was not the case here, and it is clear that it was the wrongful conduct of *Charles* first and of *James Eastwood* afterwards which really prevented the enforcement of *James Robert's* claim.

Then as to the *Statute of Limitations*: In *Gough* v. *Bult* (4), where there was a legacy bequeathed specifically to a son who died before it was paid, his personal representative was held entitled to claim it, and though the testator's death had taken place in 1823, and the suit was not instituted for many years afterwards, the Vice-Chancellor there, acting upon *Ward* v. *Arch* (5), held, in 1848, that the *Statute of Limitations* had no application to the case, and interest was given as from the death of

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(1) Law Rep. 4 P. C. 572.

(2) 3 De G. M. & G. 782. 18 Jur. 915.

(3) 3 De G. F. & J. 58. 7 Jur. N.S. 765.

(4) 16 Sim. 323; 17 L. J. (Ch.) 486.

(5) 12 Sim. 472.

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the testator. *Cox* v. *Dolman* (1), *Watson* v. *Saul* (2), and *Burrowes* v. *Gore* (3), proceeded on the same principle.

As to acquiescence: In the first place the pretence of acquiescence was answered by the fact—there had been none, not even in appearance, except in the case of the deed of 1833, which must at all events be treated as not in any degree binding on the party who executed it, for, even putting aside the allegation of fraud, it was clear that *James Robert* executed it in complete ignorance of his rights, of the obligations which the trust imposed, and of the groundlessness of the reason suggested in answer to his own claim. There can be no acquiescence except the party is fully informed as to all the facts of the case: *Archbold* v. *Scully* (4). Forbearance to enforce a right merely on account of particular circumstances which create and justify delay does not constitute acquiescence: *Lamare* v. *Dixon* (5). And where a purchaser is entirely ignorant of a fact which ought to have been communicated to him, Equity will sustain a bill at his suit to set aside the purchase: *Smith* v. *Harrison* (6). The gift of both estates follows the creation of the trust, and both are affected by it.

The liability to satisfy this legacy is undoubted; the fund out of which it could be satisfied still exists; both estates are liable; and interest is properly due from the period at which it ought to have been originally paid.

Mr. *Law* replied.

THE LORD CHANCELLOR (to Mr. *Law* and Mr. *Butt*):—Their Lordships would like to know whether you are in a position to give us any information with regard to the *Louth* estate; has it been sold, or is it in specie?

Mr. *Law*:—I fancy it is in specie. It has not been sold.

Mr. *Butt*:—I am told, my Lords, by my learned friend, Mr. *Phillips*, who knows more about this matter than I do, that there has been a petition in the Landed Estates Court in *Ireland* to sell

(1) 2 De G. M. & G. 592. 17 Jur. 97
(2) 1 Giff. 188. 5 Jur. N.S. 404
(3) 6 H. L. C. 907. 4 Jur. N.S. 1245
(4) 9 H. L. C. 360. 7 Jur. N.S. 1169.
(5) Law Rep. 6 H. L. 414.
(6) 26 L. J. (Ch.) 412. 3 Jur. N.S. 28

the two estates; the *Armagh* estate has been already sold, but the money is retained in the Court; the *Louth* estate has not been sold.

THE LORD CHANCELLOR:—What is the amount retained by the Court arising out of the *Armagh* estate?

Mr. *Butt*:—I am told that after paying all incumbrances there will be a balance of about £5000 from the *Armagh* estate.

Mr. *Law*:—I am told there will be a balance, after paying all incumbrances, of some £3000.

THE LORD CHANCELLOR:—The reason why I ask particularly is this: It is rather difficult to know how far the parties consider the question material. The case of the Appellants does not raise the question as to the charge upon the *Louth* estate. It was not argued in the Court below?

Mr. *Law*:—Not that particular point. We argued the case chiefly on the ground of length of time.

LORD O'HAGAN:—The point was not raised at all in the Court below?

Mr. *Law*:—I am not aware as to that. It was not raised in the Court of Appeal where I was.

Mr. *Butt*:—It was not raised in any of the answers.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the Plaintiff in this case sued in the Court of Chancery in *Ireland*, in order to have a legacy of £3000 charged upon certain land, raised out of the land upon which it was charged; and in order accurately to appreciate the rights of the Plaintiff it becomes necessary, in the first instance, to direct your Lordships' attention to the will under which the legacy is given, and to the construction which ought to be placed upon that will.

My Lords, the will is that of the Rev. *James Eastwood*, and it appears that at the time when he made the will, he had property in the county of *Armagh* and in at least one other county in *Ireland.* He began by these words, which I will ask your Lordships to bear in mind: "I hereby appoint my after-named executor, *Charles Eastwood,* my youngest brother, to be trustee for the following legacies." Then came the legacy, which is the only one now to be considered, which was given in these words: "considering that money would be more essential to my dear brother, *Samuel Eastwood* and his family, residing in *Dublin,* than a distant possession of land, I bequeath to my said eldest brother *Samuel,* during his natural life, the interest of £3000, and after his death to his eldest son, *James Eastwood* by his last wife, *Margaret Javoux,* or *Moron,* or *Eastwood,* till he attains the age of twenty-one, and then to obtain the principal;" and then the testator continues: "I order that my youngest brother, *Charles Eastwood*" (that is to say the person who, in the earlier part of the will, had been declared to be trustee for the legacy in question) "shall be liable to all my lawful debts due by bond or otherwise of every description, and pay them as soon as he can, and also pay my legacies when regularly due, according to my statement of them, and also that the said *Charles* shall pay all expenses of every sort which will or may occur on and after my decease; and to enable him to do all this I bequeath unconditionally to him all my estates and landed property, with all emoluments belonging to them, in the county of *Armagh;* I also bequeath to him the said *Charles* all my estates, leases, and landed property with all their emoluments in the county of *Louth* or elsewhere, if any," and so on.

Now, my Lords, in the first place, the argument at your Lordships' Bar on the part of the Appellants was this: that these words which I have read constitute a charge of the legacy of £3000 upon the landed property, but do not create any trust with regard to the payment of that legacy out of land. My Lords, this question becomes very material when your Lordships have to deal with the lapse of time which has taken place in the institution of this suit. Upon the construction of the will, I am bound to say that I cannot entertain any doubt whatever that that which is created is not merely a charge of a legacy, but is a distinct and clear trust for the payment of that legacy. In the first place, *Charles Eastwood* is declared to be a trustee for the legacies, including the one in question. If in the later part of the will there had been merely a charge for the payment of the legacies then he would be a trustee both for the legacy and the charge for the payment of it, and that alone would make him a trustee for every remedy for the recovery of the charge. Then if your Lordships find that he was himself the devisee of the land, he would be both devisee, and also the person bound to raise the legacy, and would, therefore, be a trustee for the raising of the legacy.

Then the will continues in these words, "To enable him to do all this" (that is to say, to pay the legacies among other things), "I bequeath unconditionally to him all my estates and landed property, with all the emoluments belonging to them in the county of *Armagh*," &c. Now, my Lords, I will invert these words. It is quite clear that the word "unconditionally" does not mean without any condition annexed as to the payment of legacies, because it is admitted that a charge was created, but it means an absolute owner of the fee simple for the purpose of doing that which he is ordered to do. Read in that way, the devise would run thus: I bequeath to *Charles Eastwood*, who is trustee for the legacies, all my estates and landed property in the county of *Armagh*, &c., to enable him to pay the legacy in question and other legacies. In that state of things, being the devisee of the land, and being made the devisee in order that he may pay the legacy, he is to every intent and purpose a trustee of the land for the purpose of paying the legacy.

My Lords, starting therefore with that, I have now to direct your Lordships' attention to the history of what took place. The testator died. Mr. *Charles Eastwood*, in the first instance, entered upon the possession of the land, and was the executor of the testator. The tenant for life of the legacy of £3000 died; and then his eldest son, who in the will is called *James Eastwood*, but whose full name was *James Robert Eastwood*, became entitled to the principal of the legacy. In the will he was called "*James Eastwood*," "the eldest son" of *Samuel*, "by his last wife, *Margaret Javoux*, or *Moron*, or *Eastwood*;" and your Lordships find, by what is afterwards brought to light in the case, that some question at one time existed as regards the marriage of *Samuel Eastwood* with this lady, who was called *Margaret Javoux*, or *Moron*, or *Eastwood*.

Ultimately, I believe it was decided that a marriage must be held to have taken place between those parties; but, whether that was so or not, *James Eastwood* is in the will described as "the son of *Samuel Eastwood* by *Margaret Javoux,* or *Moron,* or *Eastwood,* his wife," and there being no doubt as to the identity of the person, whether he was a son *ex legitimis nuptiis procreatus* or not, would be utterly immaterial as regards his title to receive the legacy in question.

This person, *James Robert Eastwood,* appears to have fallen into difficulties. Your Lordships do not exactly know what his position in life was. He was not an uneducated man, as you find by the specimens of his handwriting which have been produced. He was in some employment which enabled him to earn a certain amount of money, and in his petition (to which I am going to refer) to the Insolvent Debtors Court he describes himself as a farmer and jaunting-car proprietor. However, my Lords, in the year 1832, he took the benefit of the *Insolvent Debtors Act,* which was then in force in *Ireland.* He filed in the ordinary way a schedule in the Insolvent Debtors Court, and by that schedule it appears that, taking as creditors those who claimed to be his creditors, the amount of his debts altogether exceeded, I think, £800, and taking those debts in respect of which he admitted that he had received consideration, they amounted to somewhat over £600. Now out of those debts by far the two largest creditors were two persons named *Samuel Scott Eastwood,* to whom £273 were due on bond, and *John James Bigger,* who is described as of *Dundalk,* in the county of *Louth,* Esquire, to whom were due £170. Your Lordships will find that *Samuel Scott Eastwood* was a brother to the insolvent, and *John James Bigger* was also a relative, though in what degree does not clearly appear. These persons were the two principal creditors, and *Samuel Scott Eastwood* was appointed assignee in the insolvency.

The insolvency, as I have already said, took place in the year 1832, and in February, 1833, the year after the insolvency, a deed was executed between this insolvent *James Robert Eastwood* of the first part, his assignee *Samuel Scott Eastwood* of the second part, *John James Bigger* of the third part, and *James Eastwood,* who at that time had entered upon the property devised by the will, as the heir to *Charles Eastwood,* the executor and the trustee, of the fourth part.

I will ask your Lordships' particular attention to the provisions of that indenture, because it tells upon the face of it very clearly and distinctly the narrative of what passed between the parties at the time. It recites the will, and it recites that *Samuel Eastwood,* to whom the interest of the legacy of £3000 was by the will bequeathed for his life, has been for several years dead, and that *James Robert Eastwood,* a party to the deed, "claims to be the eldest son of the said *Samuel Eastwood* and the person named in the will, to whom, after the death of *Samuel Eastwood,* the legacy of £3000 was so bequeathed as aforesaid." Then it recites that *Charles Eastwood,* the devisee of the freehold estates and residuary legatee named in the will, died in the year 1830, and that "*Charles Eastwood* during his lifetime disputed the validity of the said bequest of the said principal sum or legacy of £3000 so claimed as aforesaid by the said *James Robert Eastwood,* a party" (to the deed), "and insisted that the said *James Robert Eastwood* was not the person so named and described in the said will of the said *James Eastwood,* deceased, nor in any way entitled to receive the legacy." Then it recites: "Upon the death of *Charles Eastwood, James Eastwood,* party hereto as the eldest son and heir-at-law of *Charles Eastwood,* became seised of and entitled" to the property in the will mentioned, and that *James Eastwood* has in like manner disputed the right or title of *James Robert Eastwood* to the legacy or sum of £3000.

My Lords, I must pause there for the purpose of saying that, although the word "legitimacy" or "illegitimacy" is not mentioned, yet taking these recitals in connection with that which we now know, it is clear that they mean, and it is not disputed on either side that they do mean, to refer to the alleged illegitimacy of *James Robert Eastwood,* and that they found the assertion that he was not entitled to the legacy upon his alleged illegitimacy. I may also refer your Lordships, in passing, to that which was not disputed at the Bar, that, however that assertion came to be made, and whether it was made in good faith or bad faith (that I shall consider afterwards), it was an assertion of that which, with regard to the title of *James Robert Eastwood* to receive the legacy, was utterly and entirely irrelevant—Whether he was legitimate or illegitimate he was equally the person designated—he was equally the person entitled to receive the legacy of £3000.

Then, again, this deed continues: "And whereas *James Robert Eastwood*, party hereto, having become embarrassed in his circumstances, was imprisoned for debt, and thereupon, on or about the 13th day of March last, petitioned the Court for the Relief of Insolvent Debtors to be discharged as an insolvent, and the Court having heard the petition accordingly discharged *James Robert Eastwood* as such insolvent, and appointed *Samuel Scott Eastwood*, party hereto, the sole assignee of the estates and effects of *James Robert Eastwood*." Then it recites that, "Whereas *Samuel Scott Eastwood* and *James Robert Eastwood*, by and with the consent and approbation of the said *John James Bigger*, testified by their being parties to and respectively executing these presents, have respectively proposed to *James Eastwood* to relinquish and give up all claims and demands on foot or upon account of the legacy or sum of £3000 late currency, and all interest thereof, on being paid the sum of £300 sterling by *James Eastwood*, and *James Eastwood* being desirous of putting an end to all such claims and demands, and to avoid the expense and trouble of litigating the same, should any attempt be made on the part of *James Robert Eastwood* and *Samuel Scott Eastwood*, or either of them, or any person or persons claiming by, from, through, or under them, or either of them, to establish such claims or demands, has agreed to such proposal." Then the indenture witnesses that in consideration of the £300 *James Robert Eastwood* and his assignee discharge the estates from the payment of the legacy, and they accept the £300 in full discharge of the legacy of £3000.

My Lords, this deed does describe a very extraordinary transaction. There is no concealment, on the face of the deed, as to the principle upon which the parties were acting. The person who held the land subject to the trust, and who for this purpose must be taken as a trustee of the land on the trusts mentioned in the will, is set before us here as making the allegation that he who was *cestui que trust* with regard to this legacy, was not entitled to receive the legacy, and that he was not entitled upon the ground which, true or untrue, was perfectly irrelevant as regards his title.

But your Lordships have on the other hand, not merely the insolvent himself, who was not an illiterate man, and, although he is stated to have been in embarrassed circumstances, was not a person who could be at all indifferent to the amount of this legacy, for having regard to his debts, if he was entitled to the legacy, he would have had a very considerable surplus,—but you have also two persons who were his largest creditors, and to whom the amount of his property was of the first importance; and you have those persons in this condition—likely to be well advised and able to form, perhaps, an opinion for themselves. You have, I say, on the one hand the trustee disputing the title of the *cestui que trust* upon a ground which is irrelevant, and which your Lordships would almost be disposed to call idle and absurd; and you have, on the other hand, not merely the insolvent himself, but also the assignee in the insolvency and the other principal creditor, entertaining that ground, not putting it aside as frivolous and absurd, but looking upon it with gravity, and treating it as a ground which might well become the subject of a comprehensive arrangement. And accordingly you have the £300 accepted by them in discharge of the legacy of £3000.

My Lords, this transaction has been looked upon by the Court of Appeal in *Ireland* as a transaction surrounded by fraud of a very deep and grave character. I do not find in the case any evidence with regard to fraud beyond that which the *res gestæ*, as regards the position of the parties and on the face of this deed, themselves suggest; and although it is possible that there might be underlying this deed some personal fraud, some deep design to impose upon the insolvent, some design in which his assignee and his principal creditor, for some collateral sinister reason, were willing to participate; although, I say, that may be the case, it is not to be presumed that it was the case without clear and cogent evidence upon the subject. I find no evidence beyond that which the deed itself presents, and therefore I am obliged to deal with the deed upon the face of it, not presuming that as to which I have no evidence to support the presumption, namely, that any fraud or imposition was intended.

Looking at the deed itself, what I find is that the parties to it, on both sides, are placing the payment of this £300 in discharge of the legacy of £3000 upon a ground which, when it comes to be looked at judicially, shews that if there was not fraud intended and perpetrated by the one side upon the other, there was, at all events, a state of mind, upon the part of all the parties to this transaction, which shewed that they were under an utter and entire mistake, and delusions, as to what was and what was not material as to the title of the legatee. Looked at in that way, and bearing in mind that it is a dealing between a trustee and his *cestui que trust,* although I have no evidence to fix any fraudulent motive or design upon it, I find it to be a dealing in which the trustee, without any reason or ground which can bear a moment's examination, is putting aside and repudiating and denying the title of his *cestui que trust,* and is, upon the footing of that repudiation, making to him a payment of £300, in discharge of that which ought to have been a payment to him of £3000. My Lords, that of course is a transaction which, unaffected by any question as to length of time or acquiescence or change of circumstances, could not be allowed in a Court of Equity to stand for one moment. It requires no evidence of fraud to overthrow it; it is a transaction which in itself is absolutely null and void. It is, as I took occasion to say to the learned counsel during the course of the argument, as invalid, as much a *nudum pactum,* as if a person without any instrument to support it chose to set up a payment of £300 in discharge of a debt of £3000. The instrument, with all that is related in it, is an instrument which cannot for a moment stand in the way of a suit, if brought in proper time, and brought under proper circumstances, to recover the legacy in respect of which this payment has been made.

What took place afterwards was this: The deed was executed in the year 1833. *James Robert Eastwood,* the insolvent, died, it seems, in 1835. When he died he was still an insolvent. He left a daughter, *Maria Louisa Eastwood,* his only child and his sole next of kin, and, of course, subject to any claim under the insolvency, she would have been entitled to administer to his personal estate. At the time that he died she was under age; she came of age in the year 1849. We are told nothing as to what her history was during her minority, how she was supported, or who were acting for her. After she came of age in 1849 we have no information as to where she lived, what her knowledge was as to the circumstances of her father, whether she was aware or not aware of the history with regard to this legacy of £3000. The Plaintiff in the Court of Chancery in *Ireland* has not, either in his pleadings or in his evidence, undertaken to give any information whatever to the Court upon that subject.

However, the Plaintiff states that in the year 1863 this daughter, *Maria Eastwood,* made an assignment to the present Plaintiff of her interest, as her father's daughter and next of kin, in the legacy in question, but the assignment is not produced, and we have nothing but the notice of it in the bill. However, in the year 1865, this took place, which is in evidence before us. An application was made to the Insolvent Debtors Court in *Ireland* by the present Plaintiff; the insolvency was unclosed, and the person who had been the assignee originally, *Samuel Scott Eastwood,* continued to be assignee; the application was either to change the assignee, or to remove him and to appoint in his place the present Plaintiff. That motion was made, and succeeded. It does not appear that any proceeding was taken before the Court with reference to the arrangement which had been made by the assignee in 1833 as to the legacy. No complaint was made before the Court as to that arrangement, and the present Plaintiff was appointed the new assignee, with an undertaking that no actions or proceedings were to be taken against the outgoing assignee in respect of his acts or omissions, except by leave of the Court. That, my Lords, was in the year 1865. The next step was that in 1872 the same person, the Plaintiff, who had thus been appointed official assignee, obtained letters of administration to the estate of *James Robert Eastwood,* who had died in or about the year 1835, and then the present bill was filed in 1872.

My Lords, the first question which here arises is, What is the right by such a bill—the Plaintiff suing as assignee in insolvency and as representative of *James Robert Eastwood*—what is his right as to this legacy both with regard to principal and interest?

It was contended, in the first place, that, as regards the principal, he was barred by length of time, by the positive provision of the *Statute of Limitations.* My Lords, the answer to that I have already given by anticipation. In my opinion, the legacy is given in a manner which creates an express trust on the land for the payment of that legacy, and therefore the limit of twenty years laid down by the statute is not, in my opinion, as regards the recovery of the principal of the legacy charged upon the land, any bar, or any impediment.

But then it was said, in the next place, that even if the limitation of twenty years provided by the statute did not apply, there was that acquiescence in this case which, within the authority of the cases cited, ought to be held a bar, independently of the statute. My Lords, I need not go at length through the cases which were cited; when they come to be examined they will be found not to apply to the present case. They were cases of this kind—cases where a trustee has entered into dealings with his *cestui que trust*—dealings which may be legitimate, but which, on the other hand, are open to examination when they are complained of. A trustee, for example, buys from his *cestui que trust* the trust property; there is no rule of law which says that a trustee shall not buy trust property from a *cestui que trust*, but it is a well known doctrine of Equity that if a transaction of that kind is challenged in proper time, a Court of Equity will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the *onus* of proving that he gave full value, and that all information was laid before the *cestui que trust* when it was sold. And the Court of Equity has held that, altogether independently of the *Statute of Limitations*, an acquiescence for a period short of twenty years in a concluded transaction of that kind, a transaction which is not void but at most only voidable, and may be a reasonable and proper transaction, will disentitle the Plaintiff to that relief in a Court of Equity which he might have had if he had come when the transaction was recent.

But, my Lords, that is an example of a doctrine which has no application to the present case. This is not a transaction which is voidable, which could be held to be legitimate or proper; it is a transaction which is absolutely unmeaning and void; it is not a transaction which may have two aspects, it is a transaction which has only one aspect. Has there been anything done by the present Plaintiff or by his predecessor, the assignee in insolvency, by which he has in any way acquiesced in the state of things which was created by the deed of 1833? There has simply been a failure to assert his rights in law; but if that failure has not continued for that length of time which creates a bar under the statute, I cannot discover in this case any act whatever done by him on his side, nor anything done by him which has led others to alter their position, or to take part in acts on their side, which can disentitle him to relief upon the ground that, during a period shorter than the statutory period, he has acted in a way which should disentitle him to the assistance of a Court of Equity.

Therefore, my Lords, it appears to me that as regards the claim for raising the *corpus* of the legacy, the land out of which it is to be raised being still held in the hands of those who hold it subject to its fiduciary character, there is nothing whatever, either in the bar created by the statute or in any bar created by acquiescence, which should prevent the Plaintiff from having the relief which he asks.

Now, my Lords, I wish to say a word before I turn to the question of interest, upon another matter which relates to the *corpus* of the land out of which the legacy is to be raised. It was suggested, in the course of the very able argument for the Appellants, that according to the proper construction of this will, the charge of the legacy, or the trust for the payment of the legacy, affected, not the whole of the estates of the testator, both in the county of *Armagh* and in the county of *Louth*, but only his estates in the county of *Armagh*.

My Lords, I wish to say for my own part, that if that question had been properly raised, it appears to me it would have been a question of some difficulty and well worthy of careful consideration; but I do not understand that it was raised in any way in the Court below. The distinction between the different estates is not taken in the pleadings on the part of the present Appellants. Perhaps it was not necessary that it should be taken in the Rolls Court, because the decision of the Rolls Court was that of a complete dismissal of the bill; but in the Court of Appeal I do not understand that any specific argument was directed to the difference between the charge upon the one estate and the charge upon the other. And, my Lords, if any such difference were allowed to be made, I wish to point out to your Lordships that not only would it affect the interests of those who are before the House, who can maintain and defend those interests as they think right, but it would affect the interests of other legatees not now before the House, and whose interests are charged or given in the same words as this legacy of £3000. Therefore, my Lords, finding that this difference between the two estates was not insisted upon in the pleadings, and was not made a subject of argument in the Court below, I should humbly submit to your Lordships that it would not be according to the practice of this House to allow it to be made a matter of appeal or a matter for an alteration of the decree now; and I also think that, after what we have heard at the Bar, there is a strong probability, at all events, that from the value of the estate in the county of *Armagh* it may be found that the point itself is one of no very serious consequence. But whether it is or not, I submit to your Lordships that without passing any decision upon that point you will not alter in this respect the decree of the Court below which has declared the legacy to be a charge, not merely upon the *Armagh* estate, but upon all the estates devised in the will.

Here my Lords, I come to the question which has appeared to me to be one of very considerable difficulty, the question of the amount of relief to be given in respect of the interest upon this legacy. The interest claimed is for fifty-three years, since the year 1824, and it is of course obvious that the interest is a much more important question than the *corpus* of the legacy itself. My Lords, I took the liberty to observe in the course of the argument that the bill was framed somewhat singularly in this respect, that it does not bring before the Court, at least by name or by description, the personal representative of *James Eastwood*, who for so long a time enjoyed and held the property. It does not ask for any account of the rents received by *James Eastwood* or by those who have succeeded him, but it asks that it may be declared that upon the land as it now stands, upon the *corpus* which remains, the legacy of £3000 may be declared to be a good charge, and may be raised out of the land, that is to say, this legacy which according to the case made ought to have been paid in the year 1824, and if not then paid ought to have had the interest of it provided from year to year out of the rents, is now to be raised according to the case of the Plaintiffs, out of the land as it stands, not merely the *corpus* of it, £3000, but the interest of it for fifty-three years, although during the whole of that time the rents which might have kept down the interest, have been spent from year to year as they accrued due, and the person by whom they were spent is not before the Court, or sought to be made answerable for the money which has thus been received.

Now, my Lords, as regards any express statutory bar, your Lordships have heard the able argument as to whether the 42nd section of the statute (3 & 4 Will. 4, c. 27) applies or does not apply to interest in a case of this kind. The words of that section are very clear and very emphatic, and there have been several decisions of the Courts in this country and, I think, some decisions of the Courts in *Ireland*, which seem to have held that where there is an express trust, in some cases at all events, the words of the 42nd section, however precise and emphatic they may appear, will not prevent the arrears of interest being recovered beyond the six years mentioned in that section. My Lords, I do not propose to ask your Lordships to throw any doubt whatever upon those decisions. It appears to me that it will not be necessary for your Lordships upon this occasion to consider them, and I therefore think it better in the observations that I have to make, to assume, although it is unnecessary and would therefore be improper to decide it, that those decisions have all been well founded.

But, my Lords, assuming that there would not be found in the present case any statutory bar arising from the words of the 42nd section, there still remains the question of the doctrine of the Court of Equity as to laches, a doctrine which applies with particular force to the case of an account for arrears of rent or interest, and a doctrine which in all cases is saved entire by an earlier section of the *Statute of Limitations.* I said some time ago that your Lordships find nothing in the pleadings in this case, or in the evidence, which gives any account whatever of the great lapse of time, first from the year 1833 to 1837; then from 1837 up to 1849; then from 1849 up to 1865, and then, with one exception which I am going to mention, from 1865 up to 1872. The whole of that period is a blank as regards any explanation why it was that the Plaintiff or his predecessor, the previous assignee in insolvency, or why the next of kin of *James Robert Eastwood*, his daughter, or those who acted for her during her infancy, did not take any steps for the purpose of recovering this legacy and having the legacy raised with arrears of interest. It might be that they were in ignorance of their rights, or that they were under circumstances which in some way prevented them from exerting themselves as they otherwise would have done; but your Lordships have no statement upon that point, and have no evidence upon it before you, and, indeed, so far as regards the assignees in insolvency, I have the greatest difficulty in persuading myself that there was, on their part, a possibility of any ignorance of anything that was material for them to know, if they had been inclined to use the means of information which were within their power.

My Lords, that being the case, it appears to me that it would be neglecting the most elementary doctrines of the Court of Equity, if your Lordships, without any evidence to account for that enormous delay to which I have referred, without any explanation of the reason why proceedings were not earlier taken, with the knowledge that this has been an estate yielding rents which have been consumed from year to year in the natural mode of dealing with any such estate—if you were, after that great lapse of time, to travel back for fifty-three years, and throw now upon the *corpus* of the estate a burden which ought to have been borne yearly by the rents of the estate as they came in.

My Lords, I said there was one exception as to the absence of any evidence how this long intervening period had been occupied; that exception is with reference to the years from 1865 to 1872. It appears that during that period the next of kin, the daughter of *James Robert Eastwood*, conceiving that she had a right to impeach the will which had been made by the testator who is represented by the Appellants at your Lordships' Bar, was taking proceedings to impeach that will and to claim the property upon which this legacy is charged as the heir-at-law; and she in turn was met by an allegation that there was a flaw in her own pedigree by reason of the illegitimacy of her father, to which I have referred. She was therefore litigating first the question of legitimacy, and then the question of the validity of the will. It appears to me that that is no answer whatever, especially when it does not appear to have been accompanied with any notice, or any reservation of her other rights—it is no answer whatever to those who have this estate, and upon whom this legacy is now sought to be charged, that during that number of years this lady, the next of kin, was taking her chance of acquiring a larger estate under a different title.

Therefore, my Lords, I think that in this case a limitation ought to be placed to the amount of interest which ought to be recovered. The Court of Chancery has upon matters of this kind always exercised a very wise discretion. The course which has been taken by the Court in many cases is referred to in a case which was mentioned in the course of the argument, the case of *Hicks* v. *Sallitt* (1), in the Court of Appeal in Chancery some years ago. Sometimes the Court of Chancery has limited the extent of relief, more especially in cases of charities, to the time of the filing of the bill. It appears to me that your Lordships would act upon an intelligible and wholesome principle in this case if you limited the amount of interest upon this legacy to that period of six years, which is the ordinary period of limitation laid down by the statute, not doing so by way of submitting to a bar created by the statute, but in the discretion of the Court itself as the length of time over which the claim of the Plaintiff should be allowed to range, and preventing that claim going back so far as would create actual injustice towards those against whom it would be enforced. The result of that would be, that giving the Plaintiff six years' interest prior to the year 1872, that would bring it back to the year 1866, a period at which he certainly ought, if he intended to file a bill at all, to have instituted his suit.

My Lords, I believe there is only one other matter to which I have to refer. It was very much pressed in argument upon your Lordships, that whatever might be the title of the Plaintiff to relief upon the facts I have referred to, he had lost that right to relief by reason of the way in which he had shaped his bill. There is no doubt that there are expressions in the bill which charge against the Defendants, and those who preceded them, a case of positive coercion, a scheme concocted and devised with regard to the appointment of an assignee in insolvency, and with regard to

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the execution of the indenture, a scheme based upon wilful, deliberate, and systematic fraud; and there is no doubt that, upon that ground, the bill claims a right to relief.

But, my Lords, I must remind your Lordships of what the bill also contains. The bill sets out the will under which this legacy was given, it asserts that that legacy has not been paid, and it asks that it may be declared that the legacy is well charged upon the estate as a good charge, and that it may be raised with interest. My Lords, I apprehend that that alone is a complete case for the interference of a Court of Equity. The introduction of the other elements into the bill is for a different purpose; they are introduced by way of suggesting the answer which might be made by the Defendants, and of meeting, by anticipation, that answer. The bill in substance says, True it is, although this is the right of the Plaintiff, and although the legacy has not been raised, still I shall be met by the allegation that in the year 1833 a particular indenture was executed for releasing the legacy—then the Plaintiff sets out that indenture, and then he endeavours to get rid of that indenture among other reasons—and as the principal reason—upon the ground that it is based upon and is the fruit of a fraudulent scheme.

My Lords, I have said that I find no evidence of any purposed or wilful coercion, nor of any fraudulent scheme in the ordinary sense and acceptation of the term, and I regret that, there being no evidence upon the point, charges of personal fraud have been so largely sustained in the judgment of the Court below, that is to say, in the observations of the Lord Justice, charges of personal fraud which must always press with great severity and harshness upon those who are the successors of the persons against whom those charges were made. I regret that charges of that kind are made when there is no evidence to support them, and I think the Court should always be careful as to making, especially concerning those who are in their graves, charges which are not clearly and distinctly sustained by the evidence.

But, my Lords, having said that, and conceiving that the Appellants are entitled to have that stated, and clearly stated in their favour, I cannot for a moment accept the proposition that the Respondent has lost or forfeited his title to relief by having introduced those charges into the bill. For having introduced those charges he ought to suffer in the shape of costs, but he ought not to suffer by having his bill dismissed. He has stated, I repeat, an ordinary case upon the face of this bill for the interference of a Court of Equity—he has anticipated the case which would be made against him—he might have been content to anticipate that case by stating upon the face of the bill the nature of the defence which he expected to be set up, namely, the release, and there to have left his case. He has gone farther, and he has made those charges of fraud, which, I say, using the word "fraud" as meaning personal, as distinguished from legal fraud, have not been sustained.

My Lords, it was said that according to some cases which have been decided, the bill ought under these circumstances to be dismissed. In my opinion no such decision has ever been arrived at. I need not go over those cases which have been so often cited, but what I understand to be the law is this—where there is upon the face of the bill that which will give a right to relief in the Court of Equity, that right to relief is not destroyed by the circumstance that there are also in the bill allegations of personal fraud which might give a farther or a different right to relief if they were proved. The course which has been taken, especially of late years, as to such charges, has been to dismiss so much of the bill as is founded upon those charges of personal fraud, and to dismiss it with costs.

My Lords, I therefore submit to your Lordships that the course which it would be right if your Lordships agree with what I have said, to take, in the present instance, would be this, to affirm the decree of the Court of Appeal with some variations—to affirm it in so far as it directs the legacy of £3000 to be raised—but to declare that, in taking the account of principal and interest, the account of interest should not be carried farther back than for a period of six years preceding the filing of the bill, upon the ground that under the circumstances of this case the Court does not think it fit that the account of interest should be carried farther back. And then my Lords, I should submit to your Lordships that it would be right to declare that the deed of 1833 is, under the circumstances, null and void as against the Plaintiff, and

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that it ought to be delivered up to be cancelled. But I should submit to your Lordships that it is better to omit from the decree the word "fraudulent," because, although in one sense every person in the position of a trustee who adopts conduct with regard to his *cestui que trust* which is unjustifiable and unsupported, and who uses his position as a trustee and the advantage it gives him, to withhold money from his beneficiary upon unjustifiable grounds, commits what, in the eye of a Court of Equity, is a fraud, still the term "fraudulent" in the decree raises the presumption of some moral fraud, some fraud of that kind which is specifically alleged in the bill; and inasmuch as the deed is in my judgment null and void, it appears to be sufficient that that should be declared upon the face of the decree. And then, my Lords, I think the decree should be altered by declaring that so much of the bill as seeks relief upon the allegations of personal fraud and coercion ought to be dismissed, and dismissed with costs. With these variations the rest of the decree would be affirmed, and there would of course be no costs of the appeal.

LORD HATHERLEY:—

My Lords, after hearing the very able arguments in this somewhat complicated case, I have come to the same conclusions as those which have been pointed out by my noble and learned friend on the woolsack. I shall not, therefore, detain your Lordships very long by any observations which I may think it necessary to make upon the case. At the same time, there are some features so peculiar in this particular case, that depending, as it wholly does, upon those peculiar circumstances, and being determined according to the view which my noble and learned friend has taken of it, by the consequences arising from those very peculiar circumstances, rather than by any very simple general principle, I think it desirable that a few words should be said by me upon what those circumstances are:—[His Lordship stated the dates of the will, the death of the testator, and the filing of the bill.]

The bill evidently was framed on the supposition that the Plaintiff would be exposed to considerable difficulty in making out such a case; and, therefore it was thought necessary by those who framed it, no doubt from instructions which they had received, to introduce into the bill acts and circumstances by which fraud would be charged against those who were concerned in the non-payment of the legacy, and fraud of such a character as to give a full and complete answer to the alleged delay in enforcing the rights of those who now come at so late a period to enforce them.

The charges were of a very strong character indeed. I need not go through them in detail; some have been completely disproved or failed of being in any way established in proof. These charges are:—[His Lordship stated them.]

Now it is sufficient to say that nearly the whole, I think I should not err if I said the whole, of those statements were displaced either by the circumstance that no evidence was given to establish them, or by their being met with proof to the contrary.

My Lords, I cannot help thinking it a most unfortunate circumstance that the learned Lord Justice who decided this case in the Court below, sitting with the Lord Chancellor, should have had information *dehors* the suit, which your Lordships have not, and cannot have, which the Lord Chancellor pretermitted as being beyond his cognizance, he not having any knowledge of the facts upon some of which the Lord Justice dilates, and the knowledge of which on the part of the Lord Justice appears in a great measure to have led him to form the very unfavourable view which he did form, in reference to what he considered the fraudulent conduct of those whose duty it was to pay the legacy, and who left it unpaid. I do not read the passages.

As regards the nonpayment of the legacy, the first point raised by the Plaintiffs was this: Feeling the necessity for escaping from the effect of the *Statute of Limitations* their first effort, in which, I think, they have succeeded, was to establish upon the face of the will that the legacy in question is not a legacy affected by the statute, inasmuch as it falls within the exception of devises or gifts of land upon express trust, or the case of lands subjected to express trust. There I think they have established their proposition, because the mode in which this legacy is given is as follows:—[His Lordship read the words of the will.]

Upon the whole of that will it appears to me impossible to doubt that a distinct and express trust is created for the payment of this legacy. *Charles* is, in the first place, made a trustee for the legacy, that is to say, the person who is to see to the raising of it, the person who is to take all the necessary steps for the raising of it; and then he has the estates in *Armagh* given to him expressly for the purpose of enabling him to pay the legacy; so that it does not rest upon the gift being merely for the purpose of enabling him to pay, but when he is so enabled to pay, we find this same person appointed trustee for all the legacies, including this legacy of £3000, is the person whose duty it is so to raise them. He holds the estate on the express trust imposed on him by the words at the beginning of the will, namely, as being the trustee for the legacies; he can hold the land only upon that express trust of raising the legacies, including the legacy of £3000, given by the will.

My Lords, there was a question which was touched upon very lightly; it does not seem to have been argued, or at all events not argued *in extenso*, in the Court below, namely, as to whether the estates in the county of *Louth* are included in this charge. Following the example, in this respect, of the noble and learned lord on the woolsack, I forbear to say more than this, that considering that the decree has been so framed, and considering that there are other legacies besides this of £3000 charged upon those estates, as to the position of which legacies we know nothing, I should think it wrong to take upon myself, and I cannot advise your Lordships to take upon yourselves to deal with that question so as in any way to disturb the decision already come to about it in each of the Courts below, and to do so in the absence of persons who may be interested in these legacies, and who may have a good deal to say on the subject. I think, my Lords, it is quite sufficient to say that, at least, it is a point which is open to contention on their part, and with which, in their absence, I do not think we ought to deal.

As to the deed of 1833, it can have no possible effect on behalf of those who represent the estate now sought to be charged. It is a deed which recites distinctly enough that payment of the legacy was refused on the ground that *James Robert* was not the person properly designated as the intended legatee of the £3000. The transaction is undoubtedly one of an extremely singular nature.

My Lords, when the deed comes to be looked at, and the rights of all the parties to that deed considered, it is impossible that such a deed can stand. There is not, to any legal mind, any shadow of a pretence for maintaining such a ground of exception as appears to have been taken to the right of *James Robert Eastwood.* We now know a little about this matter; we know that the main ground of contest was with regard to the legitimacy of *James Robert Eastwood.* Nobody could say that that deed could be allowed to stand, or that it could operate in any other way than as a receipt for the payment of £300, treating that sum of £300 as actually received in payment of £3000! That in itself would be enough to make the deed void, I apprehend, in any Court of Law—certainly, in a Court of Equity.

That being so, what is the result of this deed? It has one material effect with reference to this question of title. It shews that, however the impression arose, there was a wrong impression on the minds of some of the parties to that deed. There is nothing to shew how that impression was produced, but there was the impression on the minds of some, at least, of the parties to the deed, that there was a ground of resistance afforded by some cause or other, whether it is all explained by the deed or not, which opened the question to doubt. *James Robert* was afterwards proved to be legitimate; but it had been supposed that he was illegitimate, and that circumstance appears to have excited a doubt in the minds of those who were not acquainted with legal subjects. The only result the deed can produce is this, that it explains satisfactorily, at all events as far as that year goes—the year 1833—why, at that time there being an uncertainty, whatever might be the cause of it, as to the rights of the parties, those rights were not prosecuted.

It was not very long after that *James Robert* died, leaving an infant child. That infant child did not attain her age until 1849. That, no doubt, leaves a very considerable time accounted for, but after 1849 she engaged in a litigation for the purpose of establishing her title to the very estates upon which this sum of £3000 was charged. In that she failed, but that accounts for part of the interval which occurred. Besides that, when we come to the year 1872, we have this fact, that there are the estates, the

Armagh estates, or the *Armagh* and *Louth* estates, in existence, and the claim for the £3000 has never been met at all. Under these circumstances, I apprehend it is not too late for a person situated, as in this very singular case these parties have been situated, to come forward and say that he requires the payment of that £3000 which has never been paid out of that property which has always been subject to the charge, and which has always been held, first, by the original taker, and afterwards by *James*, who came in by the devise, and afterwards by his devisee, with the obligation upon them as trustees of this £3000 to make the payment of that sum.

Then comes the really grave question as to the interest, and that is the only question which from the beginning to the end of this case I confess has created in my mind any considerable doubt or anxiety. It is clear, my Lords, that if this had been a case of simple charge and no trust, there could be no possible question but that the interest could not have been charged against the property. Upon that the 42nd section of the Act 3 & 4 Will. 4, c. 27, would be clear and precise. I do not want to say more upon the 42nd section at present, because I think, deciding this case, as we do, upon the very peculiar and singular circumstances which attend it, it is not necessary to enter into the question how far the 42nd section would operate as a bar even if the case might, as regards the principal, be within the 25th section. I do not enter into that; but in this particular case I think we ought to limit the demand to that period of six years which according to the analogy of the statute would operate justice to all parties.

The foundation of the limitation in the statute I apprehend to be twofold. In the first place it is thought right that a period should be assigned beyond which actions should not be brought, on the ground of probable loss of vouchers and probable loss of evidence on the part of the persons who might be attacked by others by the act of bringing stale demands against them. The Legislature thought it right, if I may so express it, by enacting the *Statute of Limitations* to presume the payment of that which had remained so long unclaimed, because the payment might have taken place, and the evidence of it might be lost by reason of the persons not pursuing their rights. But there is also another ground which may be referred to as a sound reason for imposing a limit, and requiring that parties should pursue their rights with diligence, namely, the change of position between the parties who are sought to be affected by any such stale demands as this. Here is a demand set up for a payment of fifty-four years of interest amounting to a sum largely exceeding the principal sum. This is set up after the parties against whom it is set up have been living on the estates and spending the income of those estates, and applying it in the various ways in which they would apply it in ignorance, or without expectation, of any such demand as this being made against them.

The question is whether under those circumstances this Court, sitting as a Court of Equity, has not full and ample power to impose a limit upon the relief which should be given. My noble and learned friend on the woolsack has already referred to the cases of charities, which I apprehend have proceeded upon an exactly similar principle. In the case of charities the relief is constantly limited to the time of filing the bill; and upon this ground, that it is an attempt to recall money which has been spent by others, and to fix persons with a liability in respect of money spent in a total absence of any possible conception, on their part, that claims of this description would be set up against them. That, my Lords, I apprehend to be a very sound reason for imposing a limit upon the relief which should be given. It may be that the Court has thought it hard to impose upon trustees, as in most of these cases of charities has been the case, the obligation of refunding moneys which they have spent in consequence of the laches of those who should have proceeded more rapidly and immediately in prosecuting their rights. But I think in cases of this kind, where there is really no ground or excuse given for the delay beyond what I have mentioned, which does not apply to the interest as it applies to the principal—I say, my Lords, that no ground being given for this delay, I apprehend that the Courts have a right to impose upon the persons seeking relief at their hands these terms,—that they shall only have the same right that they would have had under the statute (for we may act by analogy to the statutory law), namely, six years' interest, which may be recovered; but that the persons who have so long been in possession of the estate should not be charged with or called upon to pay that interest beyond six years back, interest which should have been kept down *de anno in annum*, and which, if relief had been applied for in time, would have been so kept down.

I think, therefore, my Lords, that the decision suggested by my noble and learned friend on the woolsack is perfectly just and correct. As regards the dismissal of the bill with costs in respect of those parts which charge fraud, which is wholly unproved, we only follow in that respect a whole series of decisions in which that scheme was devised as being something intermediate, and stopping short of compelling parties bringing forward such a charge to pay the whole costs of the suit, even although there may have been other matter left in the bill which might enable the Court to come to a decision in their favour. I think here, if the passages relating to fraud had been struck out of the bill, there would have been enough stated in it to enable the Court to come to the decision which it did. There would remain the statement of the will, the statement of the trust thereby created, the statement of that singular deed of 1833, the statement of the devolution of the property charged with the legacy, and the statement of the devolution of the right to the legacy. I think, therefore, there would be sufficient in the bill to enable the Court to come to its decision; but I think that the part charging fraud should be dismissed, and dismissed with costs.

LORD O'HAGAN:—

My Lords, I cannot say that during the progress of the argument I have not felt difficulty as to some portions of this case, or that that difficulty has been altogether removed. But, on the whole, I do not feel at liberty to withhold assent to the opinions which have been given, and the reasons by which they have been sustained. I shall not repeat those reasons or again detail the facts.

A lengthened discussion has reduced the matter in controversy within a narrow compass, and relieved your Lordships from the necessity of considering a mass of painful allegations, as to fraud and coercion, which seem to have mainly occupied attention in the Rolls Court and the Court of Appeal in *Ireland*.

I agree with my noble and learned friend on the woolsack, that they could not properly have been the foundation of the judgment, as they have either failed of proof or been positively disproved. On that part of the case, I cannot add to the force of his observations.

The questions remain: Did the will of the Reverend *James Eastwood* create an express trust? And if it did, is that trust still enforceable, under any, and what, conditions?

The deed of February, 1833, must be considered, in the circumstances now ascertained, to have been without the colour of legality or justice. The release which it affected to create was void. The right of *James Robert Eastwood* was precisely of the same force and completeness after as before the execution of that instrument. The property which was charged with the legacy of £3000 remains in existence, and is still available, in the hands of those deriving under the will, to answer any demand which may still subsist, at Law or in Equity, on the footing of that legacy. There is no pretence for saying, save from the simple non-enforcement of the claim for such a length of time, that there has been acquiescence or waiver of any kind which could furnish an answer to it. And, finally, the deed of 1833, however ineffective it may be for any other purpose, negatives the presumption of payment of the legacy either before the execution of that deed or after it—from the death of the testator in 1808 until the present time. There is no pretence for saying that, save by a confessedly invalid deed, the *cestui que trust* of the legacy ever assented to the breach of trust which it contemplated, or that any of those who have taken under him ever received the money due in discharge of the obligation cast upon the trustee and his representatives. The debt remains as on the day of the testator's death, unless the mere lapse of time has made it irrecoverable.

Holding these things in mind, I do not think that the answers to the questions I have stated are very doubtful. An express trust was created by the will: created in terms and created in effect. The testator appoints his youngest brother "to be trustee for the following legacies"—to be trustee "for" them and not "of" them—for the administration of them and the payment of them, as he afterwards directs. And then he proceeds to specify the legacies, including that with which we have to deal, and to provide for the discharge of his debts by his nephew and executor. And, having done so, he proceeds: "And to enable him," (*Charles Eastwood*) "to do all this, I bequeath unconditionally to him all my estates in the county of *Armagh;* I also bequeath to him, the said *Charles*, all my estates, leases, and landed property, with all their emoluments, in the county of *Louth*, or elsewhere, if any."

Now, did not this will make *Charles Eastwood* a trustee, *eo nomine*, for the legacy in question here? Clearly it did; and then the specification of the legacies comes in, as by way of parenthetical description, and, what the trustee is to do "for" and about them having been set forth, the will provides, without break or pause, that "to enable him to do all this" he shall have the *Armagh* estates. It seems to me that there is here, in terms, a clear creation of an express trust. And if we look to the substance of the thing, we find all the needful elements of such a trust. There is a charge. No one has denied it. There is a donee of an estate burthened with that charge. There is a distinct declaration that he gets that estate expressly for the purpose of working out that charge, in fulfilment of the testator's declared intention. He takes it subject to the exigency of the obligation, and he is therefore emphatically an express trustee. On this point the matter seems to me plain, and I do not find that there has been any judicial difference about it.

Assuming, therefore, that we are dealing not with a mere charge, but with an express trust, enough has been said as to the legal consequences in the present case, and the peculiar circumstances distinguishing it from those on which the Appellants have relied to avoid the operation of the statute. We have here a trust fund still in the hands of a trustee, or persons claiming under him. We have no case of waiver, or acquiescence, or possible presumption of payment or discharge, and I am content to adopt the observation that, under such circumstances, Equity forbids the consecration of avowed injustice by mere lapse of time.

I do not think it necessary to refer to the lengthened disability of the person under whom the Plaintiffs claim, or the protracted litigation by which she established her father's legitimacy; and as to the forms of the pleadings, it would be useless to do more than remind the House of the passages already read by the Lord Chancellor as warranting your Lordships in disposing of the case so as to prevent the injurious postponement of ultimate decision upon it, and the institution of another unprofitable suit. In mercy to the parties the litigation should be brought, if possible, to an immediate ending, and your Lordships will probably discover in the documents and evidence, as they stand, sufficient means to avoid delay in doing complete justice.

As to the amount of interest to be allowed, I have shared the embarrassment of my noble and learned friend who immediately preceded me. The allowance of it for more than fifty years seems, in a high degree, unreasonable. The claim might have been pressed, at any time, during that long period. It cannot be said, that the persons successively entitled to make that claim had not full opportunity of understanding their rights. Neither can it be admitted that their poverty, in the circumstances in which they stood, satisfactorily accounts for the delay. The consequences of that delay may have been most serious. Parties may have changed relations with each other in reliance on the *status quo* so long undisturbed, and, on the faith of it, liabilities may have been contracted, incumbrances accumulated, and expenses disbursed, whilst, year by year, the funds applicable to the discharge of the accruing interest have been exhausted, in the absence of any demand either for it or for the *corpus* of the legacy. We have no distinct evidence as to these things, but the suggestion of such occurrences is natural and probable; and although it may not avail to bar the right which the statute saves, it must be taken into account when your Lordships are asked to fix, in your discretion, the period from which the interest shall run. That you possess such a discretion is demonstrated by very many cases which have fixed that period variously, according to the conduct and position of those concerned. I agree that it is not necessary to discuss the effect of the 25th section on the 42nd, and that we can dispose of this branch of the case, in the exercise of an unquestionable jurisdiction, *dehors* the statute. I agree, also, that, in the absence of any precise standard of action, there is difficulty in determining the way and the extent in and to which we ought to exercise it; but, taking into account the facts to which I have adverted, I think the proposal for limiting the interest to a period of six years before the filing of the bill, may equitably be entertained. Absolute right or wrong there is not, it may be, in the fixing of that precise period, and I am not sure that a farther limitation of it might be unjust; but, on the whole, it seems reasonably satisfactory, and I advise your Lordships to adopt it.

With reference to the estates charged with the legacy, I have very serious doubt whether the *Louth* property should have been affected by the decree of the Court below, or can properly be held to have been so, without disregard of material words in the will. But the question was not raised in any way on the pleadings. It does not appear to have been mooted either in the Rolls Court or the Court of Appeal. It was scarcely alluded to in the lengthened argument before your Lordships. We have no information as to facts which might aid us in reaching a right decision upon it; and I therefore concur with my noble and learned friends that we shall do most wisely in leaving it untouched.

As to the costs incurred by reason of the gross charges with which the pleadings have been unwarrantably disfigured, they must be paid by the Plaintiff, and, the decree of the Court below having been so materially varied, there should be no costs of this appeal.

LORD BLACKBURN:—

My Lords, I entirely agree in the result of what has been already said by the noble and learned Lords who have addressed the House, and I agree also in their reasons; therefore it is not necessary for me to enter at much length into the matter.

The first thing that I think is clear is that under the will of the Reverend *James Eastwood, Charles Eastwood* took a trust estate in the *Armagh* estates at least, (it is not necessary for the House now to say whether he took a trust estate also in the *Louth* estates,) he took a trust estate to pay, amongst other things, a legacy of £3000, to pay the interest on it to his brother *Samuel Eastwood* as long as he lived, and from and after his death to pay the interest during the minority, and afterwards the principal, to *James Eastwood,* who is described by a *descriptio personæ* as completely as anybody could be:—[His Lordship stated the words of the will.] It is quite clear to my mind that the duty of *Charles Eastwood* in performing his trust was to pay to *James Robert Eastwood* those £3000—*Charles Eastwood* did not do that. I do not think there is any ground for saying that he committed a fraud in the sense of deceit in not doing it. He does not seem to have made a pretence to the others about anything upon which they did not know the facts as well as himself; he told them no untruths as far as I can see; but he acted in absolute defiance of his duties as trustee. He refused to pay the money to *James Robert Eastwood* upon two grounds, one that he asserted, and I daresay sincerely thought, that *James Robert* was illegitimate; the other that his mother had not been properly and legally married to his father, and therefore the legacy was void. I perfectly agree with what has been said that no lawyer could say that there was the least colour for the supposition that that was any answer at all to the claim of *James Robert* to the legacy, but I do not agree in saying that it necessarily followed that *Charles,* and his son *James* were, either of them, wilfully and intentionally defrauding, in the sense of acting against their own consciences, in refusing to pay the money. I think, having regard to the way in which people, especially ignorant people, are apt to persuade themselves into what they wish to believe, that it is quite possible that they thought the objection was valid, though there was no legal ground for it as regards the payment of the legacy; at all events they acted as if they thought so.

That was clearly a breach of trust. The breach of trust commenced, therefore, in 1824; and had it not been that this is an express trust it is quite clear that long ago the *Statute of Limitations* would have applied and would have been a bar against the recovery of either the principal or the interest in respect of it. It is, however, an express trust, and that being so, time is no bar against an action for recovering the principal or the interest. There are two grounds of objection connected with lapse of time, namely, laches and acquiescence, which are left quite untouched by statute. We have to see how far they apply to the present case.

There is another ground upon which, not by any statute, not by any peculiar doctrine of Equity, but by common sense, lapse of time must always have great effect, that is, as to proof. If there was any disputable point open as to whether this was a legacy in the year 1824 or not, the lapse of time arising from the circumstance of the parties concerned having waited and not commenced proceedings until the year 1872, would have affected the matter; but I think, in order that it should have any such effect, you must have some point that is in dispute, some controverted point, to which the evidence would apply. To argue, as I think it was argued at your Lordships' Bar, that at the end of forty-eight years you were justified in saying, or you were bound to say, that something *must* have occurred of which nobody suggests the ground at all, that possibly for some reason or other *James Robert Eastwood* was not entitled to this legacy (it is not suggested why) does not seem to me to be reason or sense. Had it been necessary to have proof as to whether *James Robert* was illegitimate or not, there would have been great force in saying that the lapse of time would have thrown a great additional burden upon him in proving his legitimacy; but when there is nothing suggested at all, it seems to me that upon that ground the lapse of time has nothing whatever to do with the question we have to consider.

Then a short time went on, and *James Robert* became insolvent. I do not inquire whether it was a concerted insolvency or not. On his becoming insolvent, owing, as he did, £800, as far as that went his interest in this legacy and the accumulated interest of several years would be the property of the insolvent's assignee in trust for the creditors; but the surplus of that would be the property of *James Robert* himself; that is much the greater part of the sum now in dispute.

That state of things went on down to 1833. In that year the deed was executed upon which so much has been said. I think it would have been a waste of time and trouble to contend that that deed of release could have stood for a moment. I have already said that I do not think there was a fraud, in the sense of any deceit, in stating to the parties as facts that which *James Eastwood* knew to be false, but which they did not know to be so. I do not think that there was anything of that sort. I quite agree with what has been said by the noble and learned Lords who have spoken before me, that there is no pretence upon the evidence for what is suggested in the bill, and what the Lord Justice seems to have assumed to some extent and acted upon, namely, that there was any pre-arranged fraud or conspiracy to cause *James Robert* to be brought into difficulties, or to make any plan of that sort. I can only say that I see no evidence whatever to justify the conclusion that that took place, and I thoroughly and perfectly agree with what has been already said, that under these circumstances it was wrong to put it into the bill, and so far as that is concerned the parties who put it in ought to pay the costs.

Let us now go on to see what happened afterwards. We have to see what is the effect of acquiescence and laches. I take it that the cases shew this, that where there has been a breach of trust, and you come to a Court of Equity for relief, acquiescence during a period short of twenty years would bar it. I take it that there must be not only a lapse of time, but also something which amounts to acquiescence. I do not take upon myself to say what does amount to acquiescence. Whenever it appears that the estate was required to be divested, if it appears that the person who was entitled to take the estate encouraged the other to spend money upon it or to alter his position in any way, I think it is quite clear, upon grounds of justice and common sense, that he could not after that avoid the estate so as to take it himself. I am not prepared to say that it would be necessary to encourage him in the sense of actively inducing him to spend the money. I avoid going farther than saying that I am not prepared to give an opinion upon that, or to say if the one had stood by seeing that the other was altering his position and spending money upon it without warning him against it, whether that would not be a sufficient ground for holding that there was acquiescence in a Court of Equity so as to prevent his afterwards setting up his claim.

But in the present case there has been nothing of the sort. This is a case in which, in utter disregard of the rights of the *cestui que trust,* the trustee keeps back the payment. The trustee does not alter his position farther than this, that during all the time he was left in possession of the money, he would have £100 a year, or whatever the interest might be, more to spend, and it might reasonably be supposed that he would spend the £100 a year. To

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that extent his position might be altered, but there is nothing there which seems to me to amount, on the part of the *cestui que trust*, to acquiescence.

And, my Lords, I find nothing amounting to acquiescence subsequently to that. *James Robert* died two or four years after the release had been executed. There could be nothing amounting to acquiescence during those two or four years. As regards the great bulk of the property in which he was beneficially interested, he left it vested in his infant daughter, who did not come of age until 1849. She could not be acquiescing while she was an infant at all events; and after 1849 (certainly the parties who have managed the case on both sides have given us very meagre information) it does not appear when she became aware that her father had executed that deed—it does not appear whether that was before 1862 or not. In 1863 she made a conveyance of her interest to the Plaintiff who is now suing, and who is her uncle. That shews that in 1863 she had notice that there was a claim with respect to the legacy. Whether she should have stirred then or not, it does not appear material to consider, for it is clear that in 1864 the assignee was changed, and there was evidently an intention then to contest the matter, which, although it would be no proof of acquiescence, is very material as bringing in the question of laches. After 1865 no step whatever was taken until 1872, when the bill was filed.

Upon the question whether there was any acquiescence or not, I think there was none. She, or the Respondent as representing her, cannot be said to have done anything to shew that they were approving what was done at that time. I do not think they can be said to have been doing anything to shew that they were inducing the other parties to change their position at that time. I do not think, therefore, that there is any proof of acquiescence at that time; but of laches I think there is. In 1865 she was aware of the position of things. I think she should have taken steps as soon as she was aware of it to make a claim to recover the money and to proceed against those who were interested in the property, and it was laches not to apply until 1872. The laches from 1865 to 1872 is all that it seems to me necessary to consider now, without inquiring whether there was prior laches or not.

As regards the principal, I see no reason whatever for saying that the Respondent may not recover the whole.

As regards the interest, it was argued that sect. 42 of the statute is a statutable limitation saying that they shall not recover more than six years' interest. Whether that is so or not depends upon the question whether it applies to the case of express trusts or not. Upon that point I desire not to give any opinion at all. If it were necessary to give an opinion, I should wish for more time to consider it, for there are some cases bearing upon the point; but as far as I am concerned, I wish to leave the question just as it was when this bill was filed. I do not wish to add to or diminish any authority there is for dealing with it. It is quite unnecessary to decide that, when you come to the conclusion that they ought not to be allowed more than six years' interest.

Upon the other grounds I most thoroughly concur with what has been said by the noble and learned Lords who have spoken before me. In this particular case, going upon the general grounds upon which the Courts of Equity administer equity, I think we are fully justified in saying that whether there has or has not been laches in not suing at least from 1865 downwards, during which time there have been innocent persons—volunteers, it is true—finding the money in their hands, and imagining that they had more income than they really had, the interest should be allowed by analogy with what the statute gives, that is, for six years, and not more, and consequently the decree should be so altered.

I thoroughly and completely concur with all the alterations which have been proposed as to costs and everything else, and that for the reasons which have been already given.

LORD GORDON:—

My Lords, I express my entire concurrence in the views which have been stated, especially by the noble and learned Lord on the woolsack. Upon no principle of jurisprudence which exists in any civilised country could a deed such as this be defended.

Mr. *Law* mentioned the fact that the costs which were given against the Appellants in the Court below had been already paid.

THE LORD CHANCELLOR:—My Lords, any payments which have been made which may be inconsistent with the decree your Lordships now pronounce, will of course be refunded by the Court below. That is a mere matter of course.

Decree appealed from affirmed with variations, and direction as to costs in the Court below.

The Decree as varied is as follows:—

"This Court doth order that the said Decree of the Master of the Rolls bearing date the 5th day of December, 1874, be and the same is hereby reversed; and this Court doth declare the indenture of release bearing date the 1st day of February, 1833, in the pleadings in this cause mentioned, is void and of none effect as against *James Robert Eastwood*, a party thereto, and as against the said Plaintiff, *George Joseph Eastwood* his administrator, and as against the creditors of the estate of *James Robert Eastwood* in insolvency. And it is farther ordered that the Defendants, *Louisa Catherine Eastwood, Henry Thomson*, and *John Murphy*, do bring in and deliver up to the Registrar of this Court the said indenture to be cancelled. And this Court doth farther declare that the will of the Reverend *James Eastwood*, dated the 22nd day of December, 1807, created an express trust for raising the legacies, thereby given, out of the estates by the said will devised, and that the legacy bequeathed to the Plaintiff's intestate, *James Robert Eastwood*, was by virtue of said trust well charged on such estates, and is now vested in the Plaintiff, *George Joseph Eastwood*, as his administrator and as his assignee of his estates in insolvency, and it is ordered that the following inquiry be had at the Chambers of the Master of the Rolls, 'What sum is due on foot of the said legacy for principal and interest;' but this Court, having regard to all the circumstances of the case and to the delay which has taken place, doth order that, in taking the account of what is due for interest on the said legacy, interest is not to be allowed for more than six years before the filing of the bill. And this Court doth order that so much of the bill as alleges that *James Eastwood* formed a design to take advantage of the distress of his cousin, and that the pretence of the illegitimacy of the said *James Robert Eastwood* was false to the knowledge of the said *James Eastwood* and *J. J. Bigger,* and that *J. J. Bigger* and *James Eastwood* contrived to have *Samuel Scott Eastwood* appointed assignee of *James Robert Eastwood,* and that the execution of the indenture of the 1st of February, 1833, was procured by unlawful means and by fraudulent and false representations, and as prays relief on this footing, be dismissed with costs. And that the Defendants, *John James Eastwood Bigger, Louisa Catherine Eastwood,* and *Henry Thomson,* and *John Murphy,* do pay to the Plaintiff, *George Joseph Eastwood,* his costs incurred in this suit, except so much thereof as is dismissed as aforesaid, up to and including the hearing in the Court of the Master of the Rolls, when taxed and ascertained; and that the said Appellant and the said *Henry Thomson* and *John Murphy,* and *Louisa Catherine Eastwood,* and *John James Eastwood Bigger,* do respectively abide their own costs incurred in this appeal matter, and that the deposit of ten pounds lodged with the Registrar be handed back to the said Appellant, *George Joseph Eastwood,* or to Mr. *Alexander M'Cully.* his solicitor."

Lords' Journals, 20th Feb. 1877.

Solicitors for Appellant: *Martin & Leslie.*
Solicitors for the Respondent: *Watney & Tilleard.*

[HOUSE OF LORDS.]

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RICHARD CORY AND OTHERS . . . . APPELLANTS;

AND

WILLIAM BRISTOW . . . . RESPONDENT.

Thames Conservancy—Derrick—Occupation—License—Poor's Rate.

2 QBD 585-6
587
6 QBD 12
9 QBD 592-5
10 QBD 320
327.

The 20 & 21 Vict. c. cxlvii. (*The Thames Conservancy Act, Private*) vests in certain persons thereby created Conservators of the River *Thames*, all the interest of the Crown and of the Lord Mayor and Corporation of the City of *London* in the bed and soil of the river. It does so for the purposes stated in that Act, for the execution of which various powers are conferred upon the Conservators.

In execution of some of those powers the Conservators passed a resolution giving permission to the Appellants to lay down moorings, attached to which they might place a derrick hulk, 510 feet from the river wall; the work of laying down these moorings was to be done to the satisfaction of the Conservators, and was to remain "on condition that the accommodation be assessed, and the rent paid thereon; and that the hulk be not used for storing coals." The purpose of so mooring the hulk was that of fastening and holding coal vessels, while they were unloading their coals, and transferring their cargoes to barges and lighters. The derrick hulk was held in its position by chains and anchors set in large stones, and ballast placed in holes dug in the bed of the river, and the work of so placing the stones and the ballast was performed by the workmen of the Conservators, the payment for the work being furnished by the Appellants. The Conservators reserved to themselves, under the 91st clause in the Act, power to remove the hulk at a week's notice. The derrick hulk could only be removed from the moorings by being itself loosened from the chains attached to the stones and ballast in the bed of the river; these holdings in the river continuing fixed as before:—

Held, that the Appellants were liable to be rated to the relief of the poor of the parish (within which lay that part of the river where the derrick hulk was moored) in respect of the profit derived by them from its employment, as they must be treated as persons in occupation of a part of the soil and bed of the river.

Per LORD O'HAGAN:—They were as much occupiers of the land as if they had put a stage upon piles driven into the bed of the river, or had erected a house there.

The grant of the right to lay down these moorings, and then to occupy them through the instrumentality of this hulk, was an exercise of the parliamentary powers given to the Conservators under their Act.

On the facts of this case the moorings must be taken to be the property of the Appellants, subject only to the power of removal reserved by the Conservators.

THIS was an appeal against a decision of the Court of Appeal (1), which had reversed a previous decision of the Court of Common

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(1) 1 C. P. D. 54.

Pleas (1), and had thereby confirmed an assessment to poor's rate imposed on the Plaintiffs. A case was stated.

The Plaintiffs were the owners of two coal "derricks," named respectively, "*Atlas* No. 1," and "*Atlas* No. 2," which were moored in the *Thames*, and used by coal ships as the means of transferring cargoes of coals from the ships to barges and lighters. The derricks were not used to store coals, nor were they in any way occupied by the persons who were employed in the work of unloading the coal ships, and who merely went on board to perform that work. The Defendant was the clerk to the churchwardens, &c., of the parish of *Greenwich*, within the limits of which parish the derricks in question were moored. The form of the rate was as follows:—

Name of Occupier.	Description of Property rated.	Rateable Value.
		£ s. d.
William Cory & Sons . .	Moorings to which coal derrick and apparatus, *Atlas* No. 1 are moored to bed of river.	434 0 0

The form of the rate as to *Atlas* No. 2 was precisely the same, and the whole sum assessed was £139.

The coal derricks were floating hulks about 250 feet long and 95 feet wide, and they were fitted up with the machinery necessary for unloading the ships, which could firmly attach themselves to the derricks while the unloading was going on, and also for loading the barges and lighters, which, in like manner, were fastened to the derricks, the derricks thus forming a kind of wharf, though situated not on the banks, but in the stream of the river. They slightly vary their position at each turn of the tide.

The Conservators of the *Thames*, under the authority of their Act (20 & 21 Vict. c. cxlvii) (2), passed a resolution "That permission be given to Messrs. *Cory & Son* to lay down moorings (at which they may place derrick-hulk) immediately opposite the sluice next eastward of *Angerstein's Wharf, East Greenwich*, and 510 feet from the river wall of the said sluice, as per plan; the work to be done to the satisfaction of the Conservators of the River *Thames*, and under the inspection of the harbour master, and to remain, on the following conditions being agreed to and observed by Messrs. *Cory*, namely, that the accommodation be assessed, and the rent paid thereon; that the hulk be not used for the purpose of storing coals; that it be for the general purposes of the coal trade;" then followed arrangements as to the towing of ships and barges to and from the derrick, all to be done to the satisfaction of the Conservators under the inspection of the harbour master, "and with the full understanding on the part of Messrs. *Cory* that if at any time hereafter it shall be found by the Conservators inexpedient to permit the moorings for the derrick hulk to remain in that or any other part of the river, the Conservators will, under the powers vested in them by the 91st section of the *Thames Conservancy Act*, cause the same to be removed." This resolution related to derrick *Atlas* No. 1. A similar resolution was afterwards passed in relation to derrick *Atlas* No. 2, and the compensation or rent paid to the Conservators was assessed at £600 in one case and £650 in the other.

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(1) Law Rep. 10 C. P. 504, where the facts are fully stated.

(2) See *Lyon* v. *The Fishmongers' Company*, 1 App. Cas. 662, where other provisions of this Act were considered. By the Act all the interests of the Crown and of the *City of London* in the soil and bed of the river are, for the purposes of the Act, vested in the Conservators of the river appointed under that Act. See also *The Attorney-General* v. *The Conservators of the Thames* (1 H. & M. 1, at pp. 22, 26).

The moorings laid down for *Atlas* No. 1 consisted of four anchors and two stones. Two of the anchors were small, the other two were large, each being made, not like ordinary anchors on board ship, but with one fluke only, such as are used for permanent moorings. This sort of anchor could not be dropped in the ordinary way of ship anchors. A hole in the bed of the river (to the depth of about seven or eight feet) was therefore dredged out large enough to contain the whole of the anchor. Into this hole the anchor was carefully laid with the fluke downwards, and the hole was filled up, to the level of the bed of the river, with ballast, which was made to lie all round and over the anchor, and a chain cable from the anchor to the derrick, was led up through the ballast. Each of the two stones was about seven feet long, five feet wide, and three feet thick. A hole in the bed of the river was dredged out large enough to contain each stone, and about seven feet deep; a chain cable came up from the stone to the derrick and the hole of each stone was filled up with ballast; about seventy tons of ballast being used in each. *Atlas* No. 2 was moored in a similar way. The work was actually done by men in the usual employment of the Conservators, but these men were paid for their labour by the Plaintiffs.

The moorings thus formed were as firm as it was possible to place in the bed of the river, and each derrick was attached to these moorings. The derricks could not weigh the moorings as ships weigh anchors, but could only move from them by casting off the cables and leaving the anchors and stones behind.

Upon these facts the churchwardens of *Greenwich*, treating the Plaintiffs as occupiers of land within the parish, rated them to the relief of the poor. A warrant of distress was issued, the rate was paid under protest, and this action was brought. The Court of Common Pleas held that the Plaintiffs were not liable to be rated. In the Appeal Court the Judges unanimously reversed the judgment of the Court below, and ordered judgment to be entered for the Defendant. This appeal was then brought.

Mr. *Thesiger*, Q.C., and Mr. *Patchett*, Q.C., for the Appellants:—

There are two questions, first, whether under the terms of the resolution passed by the Conservators, the Plaintiffs had become occupiers of part of the soil and bed of the river, or were to be considered as mere licensees, a privilege being granted them to use the moorings while the beneficial occupation of the bed of the river remained in the Conservators themselves.

The Act here, though it related to the *Thames*, was a private Act. In the 44th clause power was given to the Conservators to make orders and bye-laws, and till they had done so, the existing orders and bye-laws were to continue—the object of the Act being, as stated in the preamble, the improvement of the river and the navigation thereof. The Conservators had power to make landing places and lay down mooring chains, and to maintain them or to remove them as should be required. And they could take the mooring chains of private individuals, and they could grant licenses for the use of mooring chains, and no place as to which a license had not been granted, could be a mooring place, but if so used the Conservators could require its removal or might treat it as a

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nuisance. All these things related to the object mentioned in the preamble of the Act, the improvement of the river and the navigation thereof. But nowhere was power given to the Conservators to demise any part of the bed or soil of the river. Nor had they done so in this instance. They had merely granted a license for the use of the moorings by the derricks, and in that way had been providing for the ordinary business connected with the navigation of the river. The moorings remained theirs. Even the grant of the use of the moorings was made subject to the power of the Conservators to terminate it at a week's notice. Such a reservation of power was in character with a license, but not with a demise. They had merely conceded an easement which they could terminate at their pleasure. With the exception of the word *rent*, which was one of the many terms describing a money payment used in the Act, there was not a single phrase which pointed to anything but a mere license to use the mooring chains till that license should be recalled. There was no permission to occupy any part of the river, but merely to lay down mooring chains, which itself was a work to be done to the satisfaction of the Conservators, and was in fact done by their workmen. Everything shewed not a demise of the soil, but a mere permission to do certain acts upon it. The Appellants had no more real occupation, in the legal sense of the phrase, than had a lodger in a house, or a visitor in an hotel.

Then as to the cases: in *Reg.* v. *Morrison* (1) there was a shipbuilding yard on the bank of a navigable river; a floating dock was in the river attached by chains to the yard. The owner of the yard and this floating dock was rated to the poor for his "river frontage with floating dock attached;" but the Court held that no rate was to be levied in respect of the floating dock, which could not be considered accessory to the yard. [Lord Blackburn:—That was no occupation of part of the soil.] In *Forrest* v. *The Overseers of Greenwich* (2) the rate was upheld because the barge was permanently attached to the shore and grounded at low water on the bed of the river; and Lord *Campbell* (3) expressly referred to these matters as the ground of liability. But in *Watkins* v.

(1) 1 El. & Bl. 150. 17 Jm 486
(2) 8 El. & Bl. 890.
(3) At p. 899.

Inhabitants of Milton (1), a grant of a permission to use the moorings of the Conservators on condition of paying an annual sum of £30 towards the expense of maintaining and repairing the moorings—similar facts not existing—the permission was held not to amount to a demise, so as to render the person who had the permission liable to be rated. *Reg.* v. *Leith* (2) appeared at first sight to be favourable to this rating, but there all the barges which formed the landing-pier of a steam-boat company, were held in their position by being firmly bolted into a wharf wall, and the rate was made on the land and premises, which were undoubtedly rateable, but even there, Mr. Justice *Wightman* said (3): "Had the rate been laid on the barges only, as distinct from the land, I should have paused before I affirmed it;" but they were really made to form an extension of the land by being solidly and firmly connected with it. And that particular reason for upholding the rate in that case, is explained by the case of *Reg.* v. *Morrison* (4), which almost immediately follows it, and shews that where there was no such fixed and immovable connection with the land, the floating dock was not rateable. In *Allan* v. *Overseers of Liverpool* (5) the *Mersey Docks* Board granted the use of certain warehouses to the steamships of the Appellant; they formed part of the land of the Dock Board, but the board there, like the Conservators here, reserved the power of putting an end at pleasure to the use of these warehouses by the Appellant, and so he was held not to be an occupier, the Commissioners of the *Mersey Docks* not having parted with their exclusive possession of the warehouses. And a similar decision was pronounced in *Inman* v. *Kirkdale* (6). In *London and North Western Railway Company* v. *Buckmaster* (7) the directors of the company, owners of some stables that stood within the gates of one of their stations, granted permission to certain coal owners to use their stables, on the payment of a monthly rent, with an undertaking to deliver up the stables at a month's notice, and the directors were treated as the occupiers of the stables, and were held to be properly rated: the coalowners being mere licensees permitted to use the stables. When the present case was before the Court of Common Pleas (1), it was held that the Plaintiffs were not liable to be rated, for that they had not an exclusive occupation of any portion of the soil of the river but merely a license to attach their vessel to the moorings at the pleasure of the Conservators. It is submitted that that was the true construction of the resolution, and no other could properly be given to it, since the Conservators had no power to demise any part of the soil or bed of the river. Even the Crown itself had no power any more than a subject to use the soil or bed of the river to any purpose amounting to a nuisance: *The Attorney-General* v. *Johnson* (2).

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(1) Law Rep. 3 Q. B. 350.

(2) 1 El. & Bl. 121.

(3) Ibid. at p. 139.

(4) 1 El. & Bl 150. 17 Jur 486

(5) Law Rep. 9 Q. B. 180.

(6) Ibid. 186.

(7) Law Rep. 10 Q. B. 70.

This is only a rehearing of the case of *Cory* v. *Churchwardens of Greenwich* (3), where it was held that the derrick was not liable to be rated, and it is submitted that that decision was correct.

Mr. *Brown*, Q.C., and Mr. *Oswald*, for the Respondent, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the question raised by this appeal is whether the Appellants are rateable to the relief of the poor of the parish of *Greenwich* under a rate or assessment which has been made against them. In the assessment, the description of the property rated is thus given:—First, "Moorings to which coal derrick and apparatus, *Atlas*, No. 1, are moored to bed of river;" Second, "Moorings to which coal derrick and apparatus, No. 2, are moored to bed of river;" so that the subject-matter, in respect of which the Appellants are said to be rateable, is, certain moorings by which a certain coal derrick is moored to the bed of the river *Thames*.

Now, my Lords, in order to place the facts of the case upon a distinct footing, and to distinguish them from one or two authorities which have been very much pressed upon your Lordships, I will direct your Lordships' attention to the statement in the case as to the nature of these moorings.

With regard to *Atlas* No. 1, the case states that it is "moored or retained at the spot where she floats in the following way, viz., by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at her head, and the other at her stern." It is also stated that having been formerly in another position than that which she now occupies, in moving her from the former position, the four anchors and the chain cables by which she had then been attached to the mooring were removed with her, and two of them were put down again in mooring her at her present moorings, and that those two are two of the four to which I have already referred. It is stated in paragraph 12 that the moorings as actually laid down for *Atlas* No. 1, consist of "four anchors and two stones" and that of those anchors "the two named in paragraph 8," that is to say, the two which had followed her from the place where she previously had been moored, which had been taken on board and brought with her, those two are "small and of little importance." "And it is not contended on the part of the Defendant that any liability to be rated in respect of the soil occupied by them attaches to the Plaintiffs." I ask your Lordships' attention to that, because it appears that there are two of these anchors, which are part of the equipment of the ship, and followed her from her previous moorings, and are dropped at her present moorings, and it is not said that they constitute any moorings in respect of which rateability will arise.

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(1) Law Rep. 10 C. P. 504.
(2) Wils. Ch. Cas. 87.
(3) Law Rep. 7 C. P. 499.

"But the other two anchors are made with only one fluke each, and are such as are never used as anchors on board ship, but are only used for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors, a hole was dredged out large enough to contain the whole of the anchor, and to a depth between seven and eight feet below the bed of the river. The anchor was then carefully laid on with the fluke downwards, and the hole was afterwards filled up to the level of the bed of the river with ballast, which lies all round and over the anchor, through which ballast the chain cable is led up to the derrick."

Then the 13th paragraph states, "The two stones used are each of them about seven feet long by five wide and three thick. In order to put each of these in their places a hole was dredged out large enough to contain the stone, and about seven feet deep. The stone was then let down into the hole, and the hole then filled up to the level of the bed of the river with ballast. There is about a four feet thickness of ballast on each stone, and about seventy tons of ballast are used in each hole, a chain cable is led up through the ballast to the derrick. The moorings formed by these two anchors and stones are as firm moorings as it is possible to place in the river. It is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor. If the derrick had to be moved, it could only be by casting off the cables and leaving these anchors and stones behind."

Now, my Lords, by whom was this work done of embedding these moorings in the soil of the river? That is stated in the 11th paragraph—"Instead of themselves laying down the moorings contemplated by the said resolution" (to that I shall afterwards have to refer—it is the resolution authorizing this work), "the Plaintiffs caused and procured the necessary work to be done by the workmen of the said Conservators, and paid the said Conservators the whole of the costs and charges of the materials and labour expended in and about the same." Therefore your Lordships will take it that it is just as if the present Appellants had themselves, by their own servants, purchased the materials which were necessary for these moorings, and then by permission of those who could authorize them, laid the moorings down in the bed of the river.

With regard to the other moorings, there is some difference in the way in which they have been made. As to them, your Lordships find this statement in the 16th paragraph: "The material position of the moorings of '*Atlas* No. 2' consists of two anchors, similar to the anchors mentioned in paragraph 12, but having iron instead of wooden stocks," "but instead of the stones used for '*Atlas* No. 1' two large fan-shaped screws have been used. These are screwed into the bed of the river to a depth of ten feet, in the manner shewn upon the plan marked 'A,' annexed hereto, which is to be taken as part of this case. These screws, together with the two single fluke anchors, form moorings as permanent as those used for '*Atlas* No. 1,' and it would be equally impossible for the derrick using them to weigh them in the ordinary way."

Those, my Lords, being the facts with regard to these moorings, I will in the first place ask your Lordships to observe how completely they differ the case from one which was referred to in the argument, a case in which the present Appellants appear to have been the Plaintiffs on a former occasion against the same Defendants, the overseers and churchwardens of *Greenwich*. That case is reported; it is *Cory* v. *Churchwardens of Greenwich* (1). The facts of that case were these:—There was a derrick which, as regards that which was above water, appears to have been of the same character as those which I have just mentioned, and it was moored in the river, but it was moored simply in this way: "by two single fluke anchors on the side nearest the shore, and by two stones on the channel side, and by two stream anchors, one at the head and the other at the stern. The anchors and stones were merely dropped into the river, no force being used for the purpose of fastening either anchors or stones. Before dropping the stones, a small quantity of ballast was removed in the bed of the river, so that the stones might lie flat." My Lords, under these circumstances, it was held that the moorings were not immoveable from the bed of the river, that they were only, as the late Mr. Justice *Willes* expressed it, "part of the equipment of the vessel itself," and that therefore there were no moorings which could be said to be fixed to the soil of the river and to be occupied as part of the soil by the Plaintiffs.

That, my Lords, I think, puts aside that authority, and will enable your Lordships, having regard to the facts which are found in the present case, to arrive, as I think you will, without hesitation, at the conclusion that you have here moorings which are clearly fixed into and bedded in the soil of the river *Thames*, just as much as if piles had been driven ten or twenty feet deep into the soil, and that if you find any person in occupation of those moorings, and that occupation is a beneficial occupation, the person so occupying is occupying hereditaments within the statutes which create chargeability to the assessment to the poor.

Well, then, my Lords, there arises the other question. Who is the occupier of these moorings? In the first place, to whom do the moorings belong? Unquestionably they belong to the present

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(1) Law Rep. 7 C. P. 499.

Appellants. They do not belong to the Conservators of the river, they were not paid for by the Conservators of the river, they were provided by the Appellants out of their own money, and put down at their own expense. And this circumstance differs the present case most materially from the second case, which was very much pressed in argument upon your Lordships. I mean the case within the jurisdiction of the Conservators of the river, the case of *Watkins* v. *The Overseers of Milton-next-Gravesend* (1).

In that case there was a coal hulk which was moored in the River *Thames* for the purpose of containing about 1600 tons of coal which were put out of lighters into the hulk and then again distributed, as occasion required, in other lighters when wanted for use. This hulk was moored in the river *Thames* within the parish of *Milton*, near *Gravesend*, and it was moored in this way: There were two screw piles driven into the bed of the river, driven in by the Conservators, and belonging to the Conservators, and a license or permission was granted by the Conservators to the owner of this hulk to moor or attach his hulk to these piles so driven into the bed of the river. It does not appear from the agreement in the case that this was an exclusive permission given to the owner of this hulk only; and if I were to judge by the agreement alone, I should have said that it might have been in the power of the Conservators either to have attached a vessel of their own, if they had one, to the same screw piles, or to have allowed some other person to attach a vessel or hulk of his. However, I see that the learned Judges assume that it ought to be looked at, and therefore I prefer to look at it, as if exclusive permission had been given to the owner of the hulk to attach, as in point of fact for several years he had attached, his hulk to the piles.

But, my Lords, that case turns entirely upon this, that the owner of the hulk, who was the person rated, was not in occupation of these moorings. The moorings were not his—the moorings were the moorings of the Conservators, and the Conservators, having these moorings belonging to themselves, gave him the permission to attach his hulk to these moorings. The Court held, and I will assume rightly held, because it does not bear in any way upon the facts of the present case, that that was merely a permission to attach the hulk to the moorings of the Conservators, and that there was no occupation by the owner of the hulk of the moorings of the Conservators.

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(1) Law Rep. 3 Q. B. 350.

My Lords, be that case correctly decided or not, it has no bearing upon the facts of the present case, where your Lordships find moorings put down by the Appellants, paid for by the Appellants, belonging to the Appellants, used by the Appellants, and used by the Appellants alone, and with regard to which either you must arrive, as it seems to me, at this conclusion, that they are occupied by no person whatever, or if they are occupied by any one, that they are occupied by the Appellants.

But, my Lords, it remains to look more accurately at what is the character of the occupation of the Appellants, and how it is that they come to have the occupation of these moorings. For the purpose of rating it might indeed be sufficient to look at the mere fact of occupation. They are found in occupation of that which is to them a valuable occupation of this fixed property, and are therefore rateable to the relief of the poor, even though it might turn out that their occupation is a wrongful one, or one the propriety of which they cannot justify. But when your Lordships look at the circumstances under which they have come into that occupation, it appears to me that their possession of the moorings is a rightful one, and is itself to be designated, according to the most accurate expression, an "occupation" of the moorings. Their occupation arises in this way: the Conservators of the *Thames*, as your Lordships well know, have, under the Act of 1857, carried over to them, and brought into their proprietorship, all the rights in the bed and soil of the River *Thames* which belonged to the Crown, or which were claimed by the Corporation of *London*. They are made the guardians, as it were, of the navigation of the *Thames*, and the protectors of the bed and soil of the *Thames* for the purpose of the navigation. They have certain powers—very large powers—given to them for the protection of the navigation; they have certain powers for making bye-laws to protect the navigation; they have powers to make piers and landing-places for the accommodation of the public; and they have powers to authorize riparian owners to make landing-places, and wharves, and jetties, and to put down mooring chains and moorings for the better and more convenient enjoyment of, and access to, their lands.

The course which in this particular case appears to have been taken was this:—An application being made by the Appellants Messrs. *Cory & Son*, to the Conservators, a resolution was passed in these words: "That permission be given to Messrs. *Cory & Son* to lay down moorings (at which they may place derrick hulk) immediately opposite the sluice next eastwards of *Angerstein's Wharf*, *East Greenwich*, and 510 feet from the river wall at the sluice as per plan, the work to be done to the satisfaction of the Conservators of the River *Thames* and under the inspection of the harbour master, and to remain on the following conditions being agreed to and observed by Messrs. *Cory*, viz., that the accommodation be assessed, and the rent paid thereon," that is to say, that the clause of the Act of Parliament should be complied with which provided that none of these permissions should be given to any riparian proprietor as a matter of favour or of indulgence, but merely upon the proper assessment by the proper officer as to the value of the permission given; "that the hulk be not used for the purpose of storing coals; that it be for the general use of the coal trade, but the barges to or from the hulk be in all cases towed by a steam tug to or from the *Custom House, London;* that all vessels leave the hulk immediately after being discharged, and that sailing colliers when discharged be towed away to such part of the river as the harbour master may direct, and in all other respects to be worked to the satisfaction of the Conservators under the inspection of the harbour master; and with the full understanding on the part of Messrs. *Cory*, that if at any time hereafter it shall be found by the Conservators inexpedient to permit the moorings for the derrick hulks to remain in that or any other part of the river, the Conservators will, under the powers vested in them by the 91st section of the *Thames Conservancy Act,* cause the same to be removed," that is to say, Messrs. *Cory* are warned at the end of this agreement that the Conservators will retain the statutory right given them by the 91st section of the *Thames Conservancy Act* of causing the moorings at any time they think fit to be removed on giving a week's notice; but, subject to that right of removing them by their statutory power at a week's notice, the moorings will be allowed to remain, the rent assessed upon them being regularly paid.

Now, my Lords, as I read that, putting aside the words and looking at the real substance of the transaction, I cannot look upon it as otherwise than an exercise on the part of the Conservators of their parliamentary powers, by giving to Messrs. *Cory* a right to lay down these moorings, and also a right, after the moorings are laid down, to occupy them through the instrumentality of this derrick, until, in the exercise of the same parliamentary powers, and upon a week's notice being given, the Conservators shall remove them from their occupation.

Therefore it seems to me that your Lordships have here a fixed property found in the occupation of the Messrs. *Cory*, to an occupation of which fixed property no person else can set up any claim, and that done under an exercise by the Conservators of powers which appear to me to provide for and to authorize, if it were necessary to find authority for it, an occupation of that particular kind.

On the whole, my Lords, I must say I am entirely satisfied with the unanimous judgment of the learned Judges of the Court of Appeal, and I submit therefore to your Lordships that this being a case of error, judgment here also should pass for the Defendant in Error.

LORD HATHERLEY:—

My Lords, I take the same view of this case which has been expressed by my noble and learned friend on the woolsack.

The two questions to which, as it appears to me, we have to direct our attention, and to which indeed our attention has been most ably directed by Mr. *Thesiger* and Mr. *Patchett* are these: First, What is the nature of the interest conferred by the agreement or permission set forth in the case before us; and secondly, when we have ascertained the character of that interest, what is the nature of the occupation which has been exercised by the the Appellants in this case?

As Lord *Campbell* expresses it in one of the cases last cited (1), as

2 Q. B. D. 585

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(1) *Forrest* v. *The Overseers of Greenwich*, 8 El. & Bl. at p. 900.

2 Q.B.D. 555

regards the nature of the occupation the question is, whether it be "a permanent and profitable occupation of land within the parish" which seeks to assess the person in respect of such occupation. As regards the interest of the person who is so to be rated it must be an interest in himself exclusively. On the first part the argument turned upon the latter branch of the case, namely, whether the Appellants had got such an occupation under this instrument as would make them liable to rating. I apprehend that in ascertaining the answer to that question the Courts have not meant by the term "exclusively" that the interest may not be determined on certain terms and conditions, but merely that the person so occupying should have the right unattended by a simultaneous right of any other person in respect of the same subject matter.

An illustration has been given in the course of the argument, which is commonly given in cases of this character, that of a landlord of an hotel, or the landlord of a lodging-house, in which case although a person sleeping at the hotel may have the exclusive use of his bedroom for the night, or the exclusive use of a sitting-room during the day, or a lodger the exclusive use of the chambers he occupies, still there is a concurrent right reserved by the landlord of the hotel or the person who lets the lodgings, of using the hotel or lodging-house for whatever purposes he may think fit for managing the establishment and all purposes connected with it. That is not such an occupation on the part of the lodger or the guest at the hotel as would make him liable to be rated.

But in the present case all the argument has turned upon this, that independently of the question whether or not this be a license or in the nature of a demise, inasmuch as there are certain bye-laws which may be made from time to time by the Conservators, who have given this permission, and inasmuch as by the 91st section of the Act the power of any person to have this beneficial occupation may be determined on a week's notice, therefore, there is not conferred on the Messrs. *Cory* the exclusive possession of these mooring-chains which they have been permitted to place in the river as is described in the case. I apprehend my Lords, that it would be a confusion of ideas to say that it interferes with the exclusive possession any more than a right of re-entry on the part

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of a landlord in certain given events could be said to interfere in any way with the right of the tenant during the time he is holding. He is in beneficial occupation for a term, though that term is limited by certain contingencies which may possibly determine his interest at an earlier period.

Now, my Lords, what is done by this agreement? A permission is granted to Mr. *Cory* to lay down mooring chains according to the powers vested in the Conservators pursuant to the 58th section of the Act; and when laid down they are to remain. He is to do that at his own expense, and he is to do it to the satisfaction of the officers appointed for that purpose by the Conservators, a phrase which would not be used with respect to any work they were to do themselves. That approbation is to be obtained, because the person who is to do this work is a person who is to make his mooring chains in such a manner as would be satisfactory to the Conservators, and when he has done that they must remain, unless a notice be given pursuant to the 91st section, or unless a change is made by the bye-laws, he being subject possibly to the bye-laws which may be made by the Conservators for the better regulation of their business. But independently of these bye-laws, independently of anything arising upon the 91st section, the mooring chains are to remain, and during the whole of that time he is in exclusive possession and in permanent possession in the sense in which that word is used in cases of this description, and in profitable possession. I cannot find anything on the face of the instrument that can intimate any doubt at all upon that being the character of his possession, the remaining of these mooring chains, of which he is to make use, being secured to him subject only to those contingencies which he has agreed upon, but the possession being full and complete until those contingencies occur.

It was observed by Mr. *Patchett*, just now, that in *Watkins' Case* (1) the Conservators did the work, and he said, "So they did here"; but that really is a fallacy, and a transparent fallacy. They did not do any portion of the work here; it was simply that instead of hiring another set of labourers the Messrs. *Cory* hired the labourers of the Conservators, which I apprehend they were at perfect liberty to do, if the Conservators were willing that they

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(1) Law Rep. 3 Q. B. 350.

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should be so employed; and they paid the Conservators for those labourers whom they so employed in execution of the work. In other words, the Messrs. *Cory* did the work through the medium of employing a particular agency; that agency makes no difference in their position. The work was entirely done by the Messrs. *Cory*, and they having done this work, all the other conditions in the agreement were also fulfilled, one of which was that the rent was to be assessed in the course provided by the Act, which was was done, and it was assessed at a tolerably high figure. All that having been done, it seems to me that Messrs. *Cory* became the owners, and, subject to the events which might determine the ownership under the permission, the sole and complete owners of this profitable tenement.

Then the question arises, are the Messrs. *Cory* the owners in the sense of being occupiers of land situate within the parish? My Lords, I can have no doubt upon that point when I look at the nature and the character of these mooring chains. They are described in the papers before us, and the case is thereby at once differed from two or three of the cases which have been cited, one being with reference to a floating dock, and another being with reference to an arrangement by which these mooring chains were sunk as they were sunk here, but fixed so far less than here, that they were capable of being moved like other anchors, whereas here they were sunk and fixed, and would have to be hauled up by means of machinery in a derrick. That alters the present case from the case of a floating dock which is, as it were, a vessel floating about upon the water, and which cannot be said to have any immoveability whatever in any given parish, and so can hardly be subject to rates. The circumstance in the other case that the derrick itself, by its own instrumentality, could haul up the stones and mooring chains just as it could any anchor, reduced it again to the case of a ship, of which it could not be predicated that it occupied land situated within a parish. But here we are told by the case itself that the derrick cannot be removed at all except by slipping its chains and cables, because the stones and the rest of the apparatus are so fixed in the bed of the river as to prevent their being hauled up or got up, except by some much more energetic mode of removal. It is not a nice question here, as was said in part of the argument, between the possibility of moving a more or a less great weight, but these circumstances indicate the intention, from the very first, of all the parties to the agreement that it should be a fixed and permanent mooring chain, subject only to such contingencies as might arise in the execution of the works of the Conservators, if anything should occur to require its removal.

My Lords, I think that none of the cases has been in the slightest degree brought up to such a case as we have here before us. I cannot have any doubt whatever that there is a permanent beneficial interest liable to be divested in certain given contingencies as I have described, that it is a valuable and an exclusive interest, and that it is an interest situate in the bed of the river within the parish of *Greenwich;* and therefore that it is liable to be rated.

LORD O'HAGAN:—

My Lords, in this case there is no real conflict about legal principle. All the Judges of the Courts below have agreed as to the grounds of rateability.

The occupation to which it is attached must be an actual, an exclusive, and a profitable occupation. The only question is, whether the Messrs. *Cory* had such an occupation? I think they clearly had, and were therefore liable to be rated.

It is not necessary to consider the nature of the powers of the Conservators for the purpose of the argument; but if it were, I have no doubt that they acted within those powers in their dealings with the Appellants. Under the 50th section of the statute they had vested in them all the interests of the Corporation of *London* and the Crown in "the bed and soil" of the River *Thames,* with authority to make jetties, piers, and landing-places, and to permit the construction of such moorings as are the subject of our inquiry.

Exercising their statutable powers, they entered into a bargain that, for certain considerations, the Messrs. *Cory* should have liberty to plant their moorings in the bed and soil of the river, with an understanding that if the Conservators should at any time find it inexpedient to permit those moorings to remain, they might cause their removal under the 91st section of the *Thames Conservancy Act*, by giving a week's notice. The Messrs. *Cory* proceeded with their work, and completed a large and costly erection, digging down several feet in the bed of the river, filling the excavation with great stones, passing heavy chains through them, and piling on the whole some seventy tons of ballast. All this was done with their own money and under their own control, and the erection so completed was their own property. The Conservators did not spend a penny or do an act in the course of the construction, or meddle in any way with it when it was completed. It remained in the hands and under the full dominion of those who had created it, subject to the right of removal of the Conservators, when they might find it desirable to fulfil the statutable conditions for that purpose.

In this state of undisputed facts, it appears to me that the Messrs. *Cory* had an occupation, an actual occupation, an occupation of a very real and substantial kind, and an occupation which was not merely actual but rightful, fairly purchased, and warranted by law. If the occupation was not in them, it was in nobody; and I cannot, in my view of the circumstances, concur with some of the learned Judges in holding that the occupation, actual or constructive, remained in the Conservators. If, by their permission, a great stage had been put upon piles driven into the river's bed for twenty or thirty feet, to which the Messrs. *Cory* only could have access as they only had erected it, or if a great house had been built with the same license and in the same way, having its foundations in the river, the Conservators might as well have been called the occupants of both, though neither belonged to them, and upon neither could they have entered for a moment.

There was, therefore, in my judgment, an actual occupation in the Messrs. *Cory*, and if their occupation was actual, it was exclusive. The license or permission, call it what you will, under which the moorings were created, was not to be capriciously determined at any instant, or without the formal notice prescribed by the statute; and until that notice was given, the Conservators, if they had ventured to intrude upon them, would have acted illegally and been liable to answer in an action. For the time, and subject to the conditions, the Messrs. *Cory* were exclusive occupants as completely as if their occupation had been of their own fee simple estate.

Then, if the occupation was actual and exclusive, it was confessedly profitable, and so had all the qualities needful to render the occupants subject to the rate.

I need add nothing to the observations already made upon the authorities—not one of them appears to me to sustain the Appellants' contention.

Mr. *Thesiger* ably urged the public importance of preserving to the Conservators the control of the river, and the inconvenience of the construction which would recognise the exclusive occupancy of the Appellants; and he pressed your Lordships to regard the irregular form of the contract, spelt out from a resolution and a letter, as diminishing its force. But that contract, although so established, is clear and specific, and the effect of its express provisions cannot be destroyed because of any allegation of its interference with the interests of commerce. The Conservators had perfect legal right to do what they did; their bargain equally bound them and those with whom they dealt, and we must accept its terms and their consequences. Besides, I confess I fail to see the superior advantages in a social point of view of the view of the Appellants, for unless the provision as to this statutable notice was a mere nullity—and this has not been asserted—it undoubtedly limited and suspended the control of the Conservators over the bed of the river, and that result, if an evil one, could not be avoided on either view of the case.

On the whole I am of opinion that the judgment of the Court of Appeal ought to be sustained.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

Neither the Court of Common Pleas in this case, nor the Court of Appeal, entertained any doubt that there was an occupation of land here, so that the parties might be liable to be rated. Upon that I will only make one remark, to shew that the case of Messrs. *Cory* against the churchwardens of *Greenwich*, in which the Court of Common Pleas had, upon this very same rate and very same derrick, decided that it was not rateable, is really not, in point of law, in conflict with the decision of the present case, either as it was determined by the Court below, or as it will now be affirmed by your Lordships. The manner in which the case was raised was different, and that made a difference in the result. In the former case, *Cory* v. *Churchwardens of Greenwich* (1), the churchwardens went before the stipendiary police magistrate and asked him to enforce the rate. Upon hearing the case he thought that the Messrs. *Cory* were rateable, and he did enforce the rate. Then he was required to state a case for the Common Pleas, which case he stated, giving powers (I suppose by consent of the parties) to the Court of Common Pleas to draw all inferences of fact from the case so stated. How they came to be so stated as they were I do not know; but, on the facts as appearing upon that case, the Court of Common Pleas, as then informed, drew the inference of fact that this derrick was no more occupying the land than any ship whose anchor has been dropped upon the ground, and which rides at anchor, can be said, in the legal sense of the term, to have an occupation of the ground. If that representation of fact was right, the conclusion of law would follow, that the Messrs. *Cory* did not occupy any land and could not be rated. That much was clear. Whether or not that conclusion was properly drawn from the evidence as stated by the magistrate is not a question now before your Lordships, and we need not form any opinion upon it. If the representation of fact was correctly made, the conclusion of law that the Messrs. *Cory* were not rateable would be perfectly irresistible.

But now, my Lords, that having taken place upon the very same rate, the parties raised the question in a different way, which also they had a right to do. The magistrate, after the decision of the Court of Common Pleas, of course refused to grant his warrant of distress; but the overseers had a right under the Act which is commonly called *Jervis's Act* to come and get a mandamus, or rather a rule in lieu of a mandamus, for the purpose of raising the question before a jury, and ultimately, as they have done here, before this the final Court of Appeal. That course having been taken, an action having been brought, the facts were more accurately determined; and what your Lordships have now to do is to see what is the effect of the facts as found and stated at the trial, not as found and stated by the magistrate previously. Taking the facts as they are found now, I apprehend that no one of your Lordships could for a moment doubt that here there was a complete occupation of the soil, (whoever it was that occupied it,) by the derrick occupying by means of those moorings which were fixed in the soil, I think I may say quite as permanently as the foundations of an ordinary house would be fixed. No doubt they were capable of being removed and taken up, and so the foundations of a house would be, still it is clear that they were fixed and occupying the soil.

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(1) Law Rep. 7 C. P. 499.

My Lords, the only other question was, Who was the occupier? Were the Plaintiffs merely persons having an easement without occupying, or were they the rightful occupiers? Upon that, my Lords, I do not think it necessary, nor would it be becoming in me as I was one of the Judges in the Court below, to say more than that I have not seen any reason to change the opinion which I then formed, as one of the Judges of the Court of Appeal, namely, that the Plaintiffs are the occupiers, and that as such occupiers they are properly rateable; and that I understand to be the opinion of all your Lordships.

LORD GORDON concurred.

Judgment of the Court of Appeal affirmed; and appeal dismissed, with costs.

Lords' Journals, 22nd Feb. 1877.

Solicitor for the Appellant: *Mark Shephard.*
Solicitor for the Respondent: *William Bristow.*

[HOUSE OF LORDS.]

H. L. (E.) ALEXANDER JOHN DUDGEON . . . APPELLANT;

1877

AND

Feb. 12, 13; E. PEMBROKE . . . . RESPONDENT.

March 23.

Time Policy—Warranty of Seaworthiness—Perils insured against.

6 QBD 57-5
57 62,

A policy of insurance was effected on ship from the 22nd of January, 1872, to the 23rd of January, 1873, both inclusive. These words were written in on a printed form, which also contained, in print, the words, *at and from*, and *for this present voyage*, and other similar words which were commonly found in the forms of a voyage policy, and which had not been erased or struck through :—

Held, that the policy was really a time policy, and its character was not affected by the printed words thus negligently left in the form.

In a time policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy. *Gibson* v. *Small* (1) supplemented by *Thompson* v. *Hopper* (2), and *Fawcus* v. *Sarsfield* (3), declared to have set at rest all controversies on this subject.

If a shipowner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover.

A time policy was effected on an iron steamer, the *Frances*, of 705 tons burden, then lying in the yard of its owner, a shipwright. It had been put under repair, and it was stated in evidence that there had not been any stint placed upon the repairs, and that the marine engineer who superintended the repairs, and the workmen who executed them, believed them to be completely satisfactory. It was expressly found that if the ship was unseaworthy the assured was ignorant of the fact. The ship went with nothing but a deck cargo of iron machinery from *London* to *Gothenburg*—made more water on the voyage than could have been expected from the state of the weather—ceased to do so on getting into harbour—was examined, and its condition on the voyage could not be accounted for; and in a few days afterwards took on board a cargo of oats and 380 tons of iron, and a deck loading of timber; started from *Gothenburg*, encountered in the open sea very bad weather which put out the fires, ran for the port of *Hull*, could not make the port, ran ashore, and after some time was broken up and became a total wreck :—

Held, that these facts shewed a loss by perils insured against—the perils of the sea—and that the assured was entitled to recover as for a total loss.

A loss caused immediately by perils of the sea is within the policy though it might not have occurred but for the concurrent action of some other cause which is not within the policy.

IN this case an action had been brought upon a policy of insurance on the iron steamer *Frances*. The policy was effected for the

(1) 4 H. L. C. 353. 17 Jur 1131.

(2) 6 El. & Bl. 172. 2 Jur NS. 609

(3) 6 El. & Bl. 192. 2 Jur NS 666

sum of £5800 on ship valued at £8000 and machinery at £4000. The policy stated that the assured "caused themselves to be insured, lost or not lost, *at and from* , for and during the space of twelve calendar months, commencing on the 24th of January, 1872, and ending on the 23rd of January, 1873, both days inclusive, in port and at sea, in dock and on way, at all times, in all places, and on all occasions and services, ... upon any kind of goods and merchandises, and also upon the body, tackle, &c., of and in the good ship or vessel called the *Frances* (S.) *whereof is master for this present voyage* , or whosoever else shall go, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship *as above*, &c., ... and further until the said ship shall be *arrived at* *as above*, until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged . . . . . Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us *in this present voyage*, they are *of the seas*, &c., *and of all other perils, losses, and misfortunes* that shall come to the hurt, &c., of the goods and merchandises and ship, &c., or any part thereof" (1).

The *Frances* was an iron screw steamer of 705 tons burden, which had been built at *Amsterdam*, in 1858, and launched in 1859, for Spanish owners (under the name of the *Paris*), and was stated to have been originally constructed of good iron. It was proved to have been lying in 1867–1868, in the harbour of *Cadiz*, unemployed, for about eighteen months. The Plaintiff was a shipwright at *Millwall*, and in 1871, the *Paris*, then lying at *Birkenhead* and being offered for sale, he contracted with the Spanish owners to build them a new vessel and to take their vessel in part payment. The vessel was, for the purpose of this arrangement, valued at £4000. It was then, as its boilers were not in good condition, towed round to *Millwall*. At the time when this transaction took place the Plaintiff was the owner of two steamers plying between *London* and *Gothenburg* for goods and passengers, but one of them broke down, and the Appellant resolved to repair the *Paris*, and run it on the *Gothenburg* line. Its name was then changed to the *Frances*. He accordingly put the vessel into a dry dock at *Millwall*, where it underwent all the repairs that were deemed to be required; and in the evidence given at the trial, it was stated that there was no stint whatever as to the amount of the repairs, and that the workmen, and the marine surveyor and engineer, believed that the ship was made seaworthy. Before the *Frances* left *London*, a surveyor from the Board of Trade surveyed the outside of the ship, but for want of time did not survey the inside of it, and therefore it did not obtain a passenger certificate. It sailed for *Gothenburg* on the 3rd of February, 1872, without one passenger. It had then some machinery on deck, but no other cargo, and was stated to be, consequently, somewhat crank. On its voyage more water was observed in it than could be accounted for by the state of the weather, but it arrived safely at *Gothenburg* on the 7th of February, and on getting into harbour the leakage ceased. On examination there by carpenters, no cause for making so much water during the voyage could be discovered. On the 11th of February the *Frances*, having taken on board a cargo of oats and 180 tons of iron, together with a deck cargo of deals, left *Gothenburg* for *London*. On the morning of the 12th of February, the ship being then in the open sea, the wind became very strong with a heavy rolling sea, and the ship laboured much, and a sail was put over the stokehole to prevent the sea from getting into the fires. The precaution did not answer; and in sixteen hours the fires were put out. Some of the wood forming the deck cargo was used for relighting the fires, and some was thrown or was washed overboard. After about twelve hours pumping, the pumps got choked with the oats, and all hands were employed in baling the ship. Evidence was given, which did not appear to be denied, to shew that the screw tunnel was not in proper order, and that if it had been, the pumps could not have got choked as they did. On the night of the 14th of February, endeavours were made to get the ship into *Hull*, but being waterlogged it did not readily answer the helm, and went ashore under *Didlington Heights*, upon the coast of *Yorkshire*, and finally went to pieces.

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(1) The words printed in italics were those referred to in the Exchequer Chamber by Lord *Coleridge*, as shewing that the policy bore the character of a voyage policy.

This action was then brought. The declaration contained a count on the policy as for a total loss and the common money counts. To the first count the Defendant pleaded: 1. Denial of the insurance; 2. Denial of the Plaintiff's interest; 3. Denial of the loss by perils insured against. 4. Misrepresentation. 5. Concealment. 6. That after the making of the policy the Plaintiff, well knowing that the ship was unseaworthy, and without any justifiable cause, sent it to sea in such unseaworthy condition, and that the loss was occasioned thereby. 7. That the voyage was illegal by reason of the ship having sailed with passengers without a passengers' certificate, and that the policy was effected to cover the illegal voyage. As to the money counts, never indebted. Issue on all the pleas.

The cause was tried before Mr. Justice *Blackburn* and a special jury at the *London* sittings after Trinity Term, 1873, when the learned Judge left seven questions to the jury, which, and the answers, were the following: 1. Was the broker's representation at the time of making the insurance correct?—Yes. 2. Was it represented that the vessel was to carry passengers, and therefore that it had been surveyed by the Board of Trade?—No. 3. Was there concealment of any matter materially affecting the insurance?—No. 4. Was the fact that the ship had not been surveyed for carrying passengers material?—No. 5. Was the vessel seaworthy when it started?—The jurymen could not agree. 6. If not, was that known to the Plaintiff?—No. 7. Was that unseaworthiness the cause of the loss?—The jurymen could not agree. The learned Judge directed the verdict to be entered for the Plaintiff, with leave to move. A rule was obtained to set aside the verdict on the 6th plea, on the ground that the findings of the jury did not warrant the entry of the verdict, and that as to the third plea there was no finding to warrant the entry of such verdict. The rule also called on the Plaintiff to shew cause why a verdict should not be entered for the Defendant, or a new trial be granted, on the ground that the findings were against the weight of evidence, and were inconsistent and incomplete. On the 6th of July, 1874, the Court of Queen's Bench gave judgment discharging the rule (1).

This decision was, on appeal, reversed in the Exchequer Chamber,

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(1) Law Rep. 9 Q. B. 581.

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the majority of the Judges there being of opinion that the answers given upon the third and sixth issues did not properly dispose of the case, and that therefore there ought to be a new trial (1). This appeal was then brought.

Mr. *Milward*, Q.C., and Mr. *A. L. Smith*, for the Appellant:—

When the principle of law that ought to govern this case is properly considered, there can be no doubt that all the issues were disposed of, and that the verdict was rightly entered for the Plaintiff.

There is no warranty of seaworthiness in a time policy on ship. In a voyage policy it is otherwise. This was a time policy, and certain expressions used in it, though relied on in the judgment of Lord *Coleridge* in the Exchequer Chamber as altering its character, had no such effect.

The question has really been decided by the case of *Thompson* v. *Hopper* (2), which followed the decision of this House in *Gibson* v. *Small* (3). *Fawcus* v. *Sarsfield* (4), and *Jenkins* v. *Heycock* (5) proceeded on the same principle.

By these authorities the law may be considered as definitely settled. The only difficulty that could exist arose from the applicability to the particular findings here of the principle involved in those decisions. The jurors could not agree whether at the time of effecting the policy the ship was or was not seaworthy, nor could they agree whether unseaworthiness was the cause of the loss. But this was a time policy, and it became immaterial to consider these questions, for a time policy involved no warranty of seaworthiness. Going out of the policy, and referring only to the general question whether the Plaintiff had sent the ship to sea knowing that it was not seaworthy, so that he might be said to have occasioned his own loss, the jurymen answered distinctly that if the vessel was unseaworthy, which they could not agree to find, at all events he did not know of its being so. The material facts were therefore found in favour of the Plaintiff, and consequently the verdict was properly entered in his favour.

(1) 1 Q. B. D. 96.
(2) 6 El. & Bl. 172. 2 Jur NS 608
(3) 4 H. L. C. 353. 17 Jur 1131
(4) 6 El. & Bl. 192. 2 Jur NS 66
(5) 8 Moo. P. C. 351.

Even if, independently of the rule of law as to a time policy, the owner of a ship was bound to send it to sea in a state fit to encounter the ordinary dangers of a voyage, it was clear that he had done so here. The evidence shewed that proper repairs had been ordered and executed, and the vessel made the voyage to *Gothenburg* in safety, and there could be no doubt that it was stress of weather and the perils of the sea that made it run ashore on its return voyage.

The cases relied on by the other side in the Court below (1), where the obligation of sending a ship to sea in a seaworthy condition was insisted on, were those of voyage policies, which had nothing to do with the present case. *Douglas* v. *Scougall* (2) was the case of a voyage policy, and the observations there made by Lord *Eldon* (3) were strictly confined to the case which he was then considering. The facts here shewed that the loss was one which arose immediately from the perils of the sea, and would have been sufficient to fix liability on the Defendant even if this had been a voyage policy: *Walker* v. *Maitland* (4); *Ionides* v. *Universal Marine Assurance* (5); *Bondrett* v. *Hentigg* (6); *Montoya* v. *The London Assurance Company* (7).

Mr. *C. P. Butt*, Q.C. (Mr. *Cohen*, Q.C., was with him), for the Respondent:—

Whatever difficulty exists in this case as to the entry of the verdict, has arisen from the answer of the jurors to the latter part of the sixth question. But that really was immaterial. The plea on which it was founded was quite sufficient to defeat the claim of the Plaintiff, without reference to that part of it which declared his knowledge of the unseaworthiness of the vessel. If the ship was unseaworthy and the Plaintiff sent it to sea in that condition, and the loss was occasioned thereby, the plea was a good answer to the action; the averment of the *scienter* was unnecessary. If the ship went to sea without being fit to encounter the ordinary risks of going to sea, not the extra ordinary risks of storms, for the

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(1) 1 Q. B. D. 96.
(2) 4 Dow. 269.
(3) Ibid. at p. 276.
(4) 5 B. & Ald. 171.
(5) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170. 10 Jne 11518
(6) Holt, N. P. 149.
(7) 6 Ex. 451.

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consequences of which the insurer alone made himself answerable, the assured could not recover. A policy of insurance was only a contract of indemnity against risks which could not be foreseen, or by ordinary care be provided against. If a vessel could not sail over a smooth sea without making water at such a rate as to threaten danger, such a vessel was not fit to be sent to sea, and was not a proper subject of insurance. It was not necessary to aver that the vessel was wilfully sent to sea in such a condition. Such an averment might be necessary to bring a man within the penal provisions of the 11th section of the 34 & 35 Vict. c. 110, but it was not necessary for the purpose of answering a claim upon a policy of insurance. It was not, therefore, necessary to put to the jury the question of knowledge, and the finding that if the vessel was unseaworthy the Plaintiff was ignorant of it, did not affect the case. The real questions for the jury were—was the vessel unseaworthy, and, if so, was that unseaworthiness the cause of the loss? On those questions, which were fairly raised by the third and the sixth pleas, the jurymen had been unable to agree. No verdict, therefore, was given upon them, and consequently there was no verdict to justify the entry of judgment. The absence of any finding could not justify the entry of a judgment as on a finding for the Plaintiff. Upon this point the case of *Thompson* v. *Hopper* (1) was really a case in favour of the Defendant, for it shewed that the fact of sending a ship to sea in an improper state, in other words in a condition not fit to encounter ordinary sea risks, was a good answer to a claim by the assured, if it appeared that by reason of the premises the ship was wrecked. That was shewn here by the plea, and that plea was really made out by the evidence, and ought so to have been found by the jury, and the want of a finding on that matter was good ground for a new trial. And the case of *Fawcus* v. *Sarsfield* (2) established even more strongly the same proposition. That was a time policy, and it was there held that a ship sent to sea not fit to perform the particular voyage, and which was therefore, without encountering any but the ordinary risks of navigation, compelled to put into port for repair, was not to be treated as a vessel the repairs of which were to be thrown on the underwriter. And that was held though it was

(1) 6 El. & Bl. 172. 2 Jur NS 608 (2) 6 El. & Bl. 192. 2 Jur NS 665

found as a fact, by the arbitrator, that the owner did not know that such was the state of the vessel when he sent it to sea. The principle was adopted in *Merchants' Trading Company* v. *Universal Marine Assurance Company* (1). The allegation of knowledge, therefore, in the sixth plea was immaterial, and ought not to have been left to the jury; but the other part of the plea was most material, and not having been answered in one way or the other by the jury, must be made the subject of another inquiry.

Then as to the supposed rule that there was not, in the case of a time policy, an implied warranty of seaworthiness. No case had yet laid down any such rule. The case of *Gibson* v. *Small* (2) did not decide the question one way or the other. It really only settled that, under such circumstances as existed there, no warranty of seaworthiness could be implied. But the vessel there was in a distant part of the world at the moment the policy was executed. Here, on the contrary, when the policy was entered into the ship was in the shipyard of the Plaintiff himself, and he had the amplest means of knowing whether the vessel was seaworthy or not. The exemption from warranty of seaworthiness in a time policy might well apply to a policy effected in *England* when the ship was in a distant port, but could not properly be applied when the vessel was in the port where the owner resided, nay more, in his own dockyard. And to hold that, under such circumstances, a warranty of seaworthiness was implied, would not entail the consequences adverted to in some of the judgments in the Court below, but would be of advantage in preventing negligence and even fraud in such cases; and such was the opinion of Lord *Eldon* in *Douglas* v. *Scougall* (3), and his observation in *Wilkie* v. *Geddes* (4), that in every contract of insurance there was an implied warranty of seaworthiness at the commencement of the voyage, though made in the case of a voyage policy, was not intended to be restricted to voyage policies alone. And Lord *Redesdale*, there, expressly adopted those observations. It is plain that Lord *St. Leonards* while admitting, in *Gibson* v. *Small* (5), that a warranty of seaworthiness was not implied in a time policy

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(1) 2 Mar. Cas. 431.
(2) 4 H. L. C. 353. 17 Jur 1131
(3) 4 Dow. at p. 276.
(4) 3 Dow. at p. 59.
(5) 4 H. L. C. at p. 417. 17 Jur 1141

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effected while the vessel was at sea, thought that it ought to be implied while the vessel was in a place where its condition was known to the assured. And Lord *Campbell* himself in that very case (1) shewed an inclination towards the same opinion.

The cases of *Bondrett* v. *Hentigg* (2), and *Montoya* v. *The London Assurance Company* (3), shewed no doubt that when the sea had utterly disabled the vessel, the injuries that afterwards happened to the goods, the subject of insurance, might be treated as losses occasioned by the perils of the sea, but here the question related to what was the cause by which the vessel had been so disabled. That question was, whether any injury would have occurred to the *Frances* from perils of the sea, if the vessel had been in a state fit to encounter ordinary sea risks.

The real substantive questions for the jury were whether the vessel was in a fit state to be sent to sea, and whether the loss had not arisen from its unfitness, and these questions not being answered, the Court below had done rightly in directing a new trial.

Mr. *A. L. Smith*, in reply:—

There was no warranty of seaworthiness in a time policy, and the question of unfitness to go to sea could only arise where there existed knowledge of unfitness or fraud was imputed. Here the existence of knowledge was distinctly negatived by the finding.

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LORD PENZANCE:—

In this case, my Lords, the action was brought by the Appellant upon a policy of insurance by which the steamship *Frances* was insured for a year for the sum of £5800, the ship being valued at £8000, and the machinery at £4000. Several pleas were pleaded by the underwriter, the present Respondent. The cause was tried, and several questions were eventually put to the jury by the learned judge, who, upon the answers of the jury, directed the verdict to be entered for the Plaintiff. A rule was obtained to set aside this verdict for a new trial, or to enter the verdict for the Defendant on the third plea. This rule was dis-

17 Jun 1443.

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(1) 4 H. L. C. at 423. (2) Holt's N. P. 149.
(3) 6 Ex. 451.

charged after argument by the Court of Queen's Bench, and an appeal was then had to the Court of Exchequer Chamber upon a special case stated by the parties. The result of this appeal was, that the judgment of the Queen's Bench was reversed and a new trial granted. It is against this reversal that the Appellant has appealed to your Lordships' House; and the questions raised in the case, though not numerous, are of extreme importance in the administration of the law of marine insurance.

My Lords, the policy in this case is a time and not a voyage policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in Courts of Law, to permit of any such conclusion.

The policy, then, being a time policy, the first question raised for your Lordships' determination is, whether the law implies in such a contract any warranty that the vessel should be seaworthy at any period of the risk, and if so, at what period or periods.

My Lords, this is no new question. It was raised in the case of *Gibson* v. *Small* (1), which was determined by your Lordships' House in the year 1854, and has been the subject of more than one subsequent decision. I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider that the case of *Gibson* v. *Small* (1), supplemented as it was by the two cases of *Thompson* v. *Hopper* (2), and *Fawcus* v. *Sarsfield* (3), must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at

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(1) 4 H. L. C. 353. 17 Jur 1131.
(2) 6 El. & Bl. 172. 2 Jur N.S. 1608
(3) 6 El. & Bl. 192. 2 Jur N.S. 666, 667

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any particular time shall have been seaworthy. In pronouncing the judgment of the majority of the Court in the latter case, Lord *Campbell* said, "For the reasons which I gave in the case of *Gibson* v. *Small* (1), and which I have given in the case of *Thompson* v. *Hopper* (2), I think there is *no implied warranty of seaworthiness in any time policy*."

From that time, upwards of twenty years ago, to the present, these decisions have been acted upon and submitted to, and thousands of time policies have been effected and millions in losses adjusted under them; and whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be, as a matter of public policy and concern, that some such obligation of keeping his vessel, as far as it is within his power, seaworthy, should be cast on a shipowner, the law must, I submit to your Lordships, be considered as settled by these decisions, and any change made in it must be by legislative authority alone.

It was next contended that the vessel in this case was not lost by "perils of the sea," and that some question ought to have been put to the jury by the learned Judge upon this subject. The circumstances of the vessel's loss are detailed in the special case. It is only necessary to quote a few sentences of it: "The *Frances* laboured heavily, and began to make water to such an extent that in sixteen hours the fires were extinguished. A portion of the deals which formed the deck cargo was used for relighting the fires, and the rest was thrown or washed overboard. After about twelve hours pumping the pumps got choked with the oats, and all hands had to be employed in baling the ship." There was evidence given by the Defendants that had the screw tunnel been in proper order, the pumps would not have got choked as they did. "On the night of the 14th of February those on board the *Frances* having sighted the *Spurn Lights*, endeavoured to get her into *Hull*; the ship at the time being waterlogged, did not readily answer her helm. Partly from this, and partly from the thickness of the weather, which at the time was very dense, on the following morning, at about 5 A.M., the ship having been in a state of distress since the morning of the 12th of February, went

(1) 4 H. L. C. 353. 17 Jur 1131

(2) 6 El. & Bl. 172. 2 Jur NS 668

ashore under *Didlington Heights*, upon the coast of *Yorkshire*. One of the boats was swamped, but the crew were all saved by a smack. Part of the cargo was afterwards saved, but the vessel could not be got off, and subsequently broke in two, and, finally, after some months, went completely to pieces."

These facts require no argument. If ever a vessel was "lost by perils of the sea," understanding those words in the sense which the Courts of this country have uniformly ascribed to them, this vessel undoubtedly was so; and the real question intended to be raised, therefore, is, whether a vessel not strong enough to resist the perils of the sea (in another word, unseaworthy,) can be properly said to be "lost by perils of the sea," when it is clear that by the force of the winds and waves it went ashore, and finally "broke up and went to pieces." The question, therefore, is one of law, and not of fact, and the learned Judge was quite justified in entering the verdict as he did, without asking the jury any farther question as to the loss, about which there was no fact in dispute, subject to determination of the question of law so raised.

In discussing such a question it must be assumed (as it was admitted by the Appellant that it should be, for the sake of argument), that the vessel was not seaworthy, and that its want of seaworthiness caused it to be unable to encounter successfully the perils of the sea, and so to perish. The question, therefore, is in substance the same as that raised by the sixth plea, or rather so much of it as the jury found to be proved, namely, that the vessel "sailed from *London* in a wholly unseaworthy condition in the voyage on which she was lost," and that the ship "was lost, as alleged, by reason of such unseaworthiness." For this plea must be understood to mean, not that the vessel did not perish immediately by the action of the winds and waves (if it did it was certainly not sustained by the facts), but that the loss by these perils of the sea was brought about by the vessel's unseaworthiness.

It will at once occur to your Lordships, upon the raising of such a question, that it applies as much and as fully to a voyage policy as to a time policy. If a loss proximately caused by the sea, but more remotely and substantially brought about by the condition of the ship, is a loss for which the underwriters are not liable,

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then, quite independently of the warranty of seaworthiness, which applies only to the commencement of the risk (in its several "gradations," as Mr. Justice *Erle* in *Thompson* v. *Hopper* (1) called them), the underwriters would be at liberty, in every case of a voyage policy to raise and litigate the question whether, at the time the loss happened, the vessel was, by reason of any insufficiency at the time of last leaving a port where it might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability.

If such be the law, my Lords, the underwriters have been signally supine in availing themselves of it. For there is no case that I am aware of, except those to which I have referred, in which anything like such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine.

The case of *Fawcus* v. *Sarsfield* (2) was relied upon at the Bar, but that was a case of partial loss, in which the question was whether the underwriters were liable for certain repairs, and the Court held that the arbitrator had found "that the necessity for repairs did not arise from any peril insured against, but from the vice of the subject of insurance."

In the total absence, then, of all authority, and in the fact that this defence is a new one, I find sufficient reason for advising your Lordships not, now for the first time, to sanction a doctrine which would entirely alter the hitherto accepted obligations between underwriter and assured.

It was said by one of the learned Judges in the Exchequer Chamber that "the unseaworthiness of the ship at the commencement of the voyage, which really causes the loss, is a fact, the consequences of which are imputable to the assured, and were to be borne by him, and not the underwriters." But the question, as it seems to me, is not what losses ought in the abstract to be borne by the assured as being "imputable" to him or his agents on the one hand, or by the underwriters as being caused by the elements on the other hand, but what losses they have mutually agreed should be borne by the underwriters in return for the premium they have received. These losses are in the contract of insurance, amongst others, declared to be all "losses by perils of the sea." A long course of decisions in the Courts of this country has established that "*causa proxima et non remota spectatur*" is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it.

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(1) 6 El. & Bl. 172, at p. 181. 2 Jur NS 610 (2) 6 El. & Bl. 192. 2 Jur. NS. 665.

It is, I conceive, far too late for your Lordships now to question this construction of the underwriters' obligations, if, indeed, you were disposed to do so.

The only exception which has hitherto been established to the underwriters' liability, thus construed, is to be found in the case of *Thompson* v. *Hopper* (1), where it was alleged that the shipowner himself knowingly and wilfully sent the ship to sea in an unseaworthy state, and that she was lost in consequence.

It is only necessary to observe upon that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at—there is no case that warrants your Lordships in going farther—and on the other hand it is easy to see that the arguments employed in this case, if sanctioned by judicial decision, would result in relieving the underwriters from many other losses to which they have hitherto been held liable. For instance, the assured has hitherto always been held protected from loss through the perils insured against, though that loss was brought about through the negligence of his captain or crew. Now the captain has the entire control of the vessel in respect of repair in foreign ports, as of everything else, and if the 6th plea in this case were held to be sufficient without proof of the shipowner's knowledge and wilfulness, the result would be that whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss, though caused by perils of the sea, could be traced to the ship's defective condition, the assured would lose the benefit of his policy. Such a doctrine, once established, would extend equally to the negligent conduct of the master in

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(1) 6 El. & Bl. 172. 2 Jur NS 608

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the course sailed by the ship, or the careless management of the ship in an emergency, or the absence of reasonable and proper exertion on the part of the captain or crew.

For these reasons, my Lords, I submit to the House that the judgment of the Court of Exchequer Chamber ought to be reversed.

My Lords, I may state that my noble and learned friend the Lord Chancellor has been made acquainted with the judgment I was about to deliver in this case, and that he desires me to say that he entirely agrees with it, and does not wish to add anything to it.

Lord O'Hagan:—

My Lords, having had the advantage of perusing the opinion delivered by my noble and learned friend who has just addressed your Lordships, and adopting it, after sufficient consideration, without any reserve, I do not propose to go again over the reasons on which it is grounded. I would only say a word with reference to one of the judgments we are reviewing, with which I am unable to concur.

Notwithstanding the suggestions in that judgment, I think that the policy in this case was a time policy, and nothing else; and I would urge upon your Lordships the importance of abiding by the well-considered decision of this House in *Gibson* v. *Small* (1), followed by subsequent cases of high authority, and accepted as the rule of mercantile action for so many years, which determined that in such a policy, framed in the usual terms, there is no implied warranty of seaworthiness. That decision was wise, convenient, and safe. It was in accordance with the sound principle which forbids the importation into a written contract, save in exceptional cases which are familiar to us all, of material terms which the parties to it have not thought fit to insert. It was convenient as furnishing one of those "'plain rules,' without qualification or exception," which Lord *Campbell* has described in *Gibson* v. *Small* (1) as "most desirable in commercial transactions," avoiding extreme refinements or the superfluous raising of diffi-

(1) 4 H. L. C. 353. 17 Jur 1131

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cult questions from special circumstances. And it was safe; because express stipulation can always be introduced when needful. The want of implied warranty does not protect the insured against the consequences of his own fraud, or wilful concealment, in nullifying the insurance, nor does it deprive the insurer of his protection against such malversation, or of the security he may derive from the inspection which he has the opportunity of making for himself, in the only case to which Lord *St. Leonards* referred (in *Gibson* v. *Small* (1)), as possibly justifying the implication of a warranty in a time policy, *i.e.*, when it is effected on a vessel about to sail on a particular voyage. In the case before the House the jurymen have expressly negatived all knowledge of the alleged unseaworthiness on the part of the insurers, and there is no evidence of fraud of any kind.

The principle so long established cannot be disturbed merely upon the suggestion of one of the learned Judges that it is desirable to put difficulties in the way of those who either criminally or negligently send unseaworthy ships on dangerous voyages. If the public interest, for that or any other reason, requires a change in a law so well established, it should be made by the authority of the Legislature.

As to the loss of the vessel by the perils of the sea, I can add nothing to the observations of my noble and learned friend.

LORD BLACKBURN:—

My Lords, I also have had an opportunity of perusing the opinion of the noble and learned Lord who moved the judgment of the House in this case, and I perfectly and thoroughly concur in it. I will say no more than that I agree both in the reasoning and in the conclusion.

LORD GORDON:—

My Lords, I am of the same opinion. I think the case of *Gibson* v. *Small* (2) is decisive of the question in this case. There may, possibly, be questions as to the propriety of the principle thus affirmed, but if a change is desirable, it can only be made

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(1) 4 H. L. C. 417. 17 Jur 1141 (2) 4 H. L. C. 353, 17 Jur 1131.

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by the will of the Legislature; and if any proposition to that effect were brought forward, it would probably give rise to considerable discussion.

Judgment of the Court of Exchequer Chamber reversed; the judgment of the Queen's Bench affirmed; and the Respondent to pay to the Appellant the costs of the appeal.

Lords' Journals, 23rd March, 1877.

Solicitors for the Appellant: *Cattarns, Jehu, & Hughes.*
Solicitors for the Respondent: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

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CHARLOTTE F. GISBORNE, LOUISA MANN, H. A. TREVELYAN, AND J. H. TREVELYAN . . . . APPELLANTS;

AND

WALTER JOSEPH GISBORNE, ABRAHAM BASS, AND OTHERS . . . . RESPONDENTS.

Will—Trustees' Discretion—Two Funds—Form of Decree.

10 Ch D 276
21 Ch D 574
[illegible]
21 [illegible]
22 Ch D 190
24 Ch D [illegible]

8 Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the Court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the Court will not exercise its ordinary power. The fund so specially provided will be left to the exercise (*bonâ fide*) of the discretion of the trustees.

A testator (whose wife had, in her own right, property which was not referred to in his will) devised his real and personal estates to trustees upon various trusts, one of which was that "my said trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income, of my real and personal estate and investments, &c., as they shall think expedient to or for the clothing, board, &c., for the

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personal and peculiar benefit and comfort of my dear wife." One of the trustees was the testator's brother, and he was made the residuary legatee:—

Held, that the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will.

The absolute discretion and "uncontrollable authority" of the trustees being thus recognised, a declaration in the decree that "their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources will make up," &c., was ordered to be struck out.

But this varying of the decree of the Court below was not to affect the costs of the appeal.

Directions given as to how this part of the decree was to be framed.

THIS was an appeal against a decision of the Lords Justices, which had reversed a previous decision of Vice-Chancellor *Hall* (1).

The first Appellant was a lady who, since her husband's death, had been judicially declared a lunatic, and the other Appellants were the committees of her person and estate. The Respondents were the executors and trustees and beneficiaries of her late husband's property under his will. The question raised depended on the construction of certain parts of that will, and was, in substance, whether the cost of the maintenance of the lunatic was a primary charge on the husband's property, or upon the property to which she was entitled in her own right under the settlement made on her marriage in June, 1861, and which was said to be of the annual value of £662.

On the 11th of October, 1860, the husband, who had for some time previously been paying for the maintenance of his wife at an asylum the sum of £6 6*s.* a week, made his will. By that will he gave his furniture, books, wines, &c., to his executors and trustees, "upon trust to permit my dear wife to have the use and enjoyment thereof during her life:" after her death such articles as were unconsumed to be sold, and the produce thereof to sink into the residue of his personal estate. He devised all his real estate and bequeathed his personal estate unto his brother, *Walter Joseph Gisborne* and *Abraham Bass*, their heirs, executors, &c., respectively, upon trust to deal with the investments as might in their

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(1) *Weekly Notes*, Nov. 21, 1874, p. 198, and Feb. 13, 1875, p. 21. 23/10 R 410

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21 ChD 94

discretion be found necessary. "And upon farther trust that my said trustees *in their discretion, and of their uncontrollable authority,* pay and apply the whole, or such portion only, of the annual income of my real and personal estate, and of the investment and securities for the time being, as they shall think expedient, to or for the clothing, board, lodging, maintenance, ease, and support, or otherwise for the personal and peculiar benefit and comfort of my dear wife, *C. F. G.*, during her life, whether competent or incompetent to give an acquittance or discharge, at such time and times, and in such proportions and manner in all respects as my said trustees shall think most conducive to her comfort, enjoyment, and convenience, without being liable to account for such payment or application, or pay the same income, or any part thereof, to any other person or persons for the purposes aforesaid, without seeing to its application." There were then directions as to investments and accumulations, and if at the death of the wife there was any unapplied income it was to sink into the residue of the personal estate. And after her death the real and personal estate to be converted into money for the benefit of certain persons specially named; and then legacies were given, the sum of £100 a-piece to the executors for their trouble, and some small legacies to servants. And as to the residue to divide and apportion the same into four equal shares, one to his brother, *Walter Joseph Gisborne* (one of the executors and trustees), and the rest to other persons specially named.

There was not in the will any allusion to the marriage settlement, or to the property to which it applied. The testator was not at the time of his death entitled to any real estate, but he left personal estate to the value of above £35,000.

On the 6th of June, 1872, *J. H. Trevelyan* (since deceased) as the next friend of *Charlotte Frances Gisborne* (formerly *Trevelyan*), a person of unsound mind, though not then so found by inquisition, instituted a suit against the two executors and trustees of the will of the Rev. *James Gisborne*, praying that it might be declared that *C. F. Gisborne* was entitled to have a provision made for her in the words of the will out of the income of the testator's real and residuary personal estate during her life, and that that annual income was the primary fund for that purpose. This bill was afterwards amended by making the persons interested in remainder under the will parties to the suit. The answer of the executors was filed on the 15th of November, 1872. An inquisition in lunacy was taken on the 23rd of November, and the lady was found lunatic, and an order in lunacy was made allowing the sum of £696 per annum for her support, but without prejudice to any question as to the fund from which the sum was to be raised. Committees were appointed, and they were authorized, pending the suit in Chancery upon the construction of the will, to pay the money out of the funds of the settlement, and should there be any deficiency, the executors of the will were (also without prejudice to any question as to primary liability) to make it up out of the testator's assets.

The cause came on for hearing before Vice-Chancellor *Hall*, on the 10th of November, 1874, when the annual income of the testator's estate was declared the fund primarily liable for the total amount of the maintenance of *C. F. Gisborne*. On appeal, the Lords Justices, by an order dated the 15th of March, 1875, reversed this decision, and instead thereof declared that the trustees had an absolute discretion to apply the whole, or any portion, of the income of the testator's estate for the maintenance of his widow. The present appeal was then brought.

Mr. *Davey*, Q.C., and Mr. *J. R. Brooke*, for the Appellants:—

There could be no doubt that the intention of the testator was to employ the income of his property for his wife's maintenance. He never even alluded to the property to which she was entitled under the settlement, but he provided for her comfort by his directions to his trustees, and he shewed that he thought they might exhaust the annual income of his property in obeying his directions, for he spoke doubtfully about the surplus that might then remain to sink into the residue. He did not intend that his residuary legatees should be benefited at the expense of his wife, or of his wife's estate. The fact that he did not mention the income to be derived under the settlement, favoured that construction of his will, and the decisions of the Courts in previous cases were in support of it; for they all proceeded on the principle that

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what would be most beneficial to the lunatic, in case of recovery, ought to be done: *Re Ashley* (1); *Methold* v. *Turner* (2); *Rudland* v. *Crozier* (3). And that principle became not the less but the more applicable, where the trustee of one of the funds (the one not the property of the lunatic) was also residuary legatee of that fund, and would be personally benefited by throwing the primary liability on the other fund. In *Foljambe* v. *Willoughby* (4) the same principle was applied where two distinct funds were given for the maintenance of an infant. *Coventry* v. *Higgins* (5), *Winch* v. *Brutton* (6), *Ransome* v. *Burgess* (7), and *Nickisson* v. *Cockill* (8), were also cited.

Mr. *Chitty*, Q.C., and Mr. *E. Rodwell*, and Mr. *Hemming*, Q.C., and Mr. *Dundas Gardiner*, who appeared for the various Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I cannot, after hearing the able argument for the Appellants in this case, entertain any doubt as to the correctness of the decision of the Lords Justices, nor do I think that any one of your Lordships entertains any doubt upon the subject.

My Lords, the question, however much it may be discussed, must really come back to and turn upon the construction of the will which we have before us. No doubt various cases have occurred in the Court of Chancery (to some of which reference has been made) in which, either from the trustees submitting to the Court the question of how they ought to exercise a power or a trust reposed in them, or from questions having been raised by the parties interested as to whether a trust for maintenance or a similar trust had actually arisen and ought to be acted upon, decisions have been arrived at by the Court which I should be very unwilling to throw the least doubt upon; but those decisions appear to me not at all to touch the present case where, as I shall submit to your Lordships, you have the trustees made the absolute masters of the question, where you have them armed with a complete and uncontrolled discretion, and where they come before you stating that they are prepared to exercise that discretion within the limits within which it is confided to them by the will.

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(1) 1 Russ. & My. 371.

(2) 4 De G. & Sm. 249; 20 L. J. (Ch.) 201.

(3) 2 De G. & J. 143; 27 L. J. (Ch.) 261.

(4) 2 S. & S. 165.

(5) 14 Sim. 30.

(6) Ibid. 379.

(7) Law Rep. 3 Eq. 773.

(8) 3 De G. J. & S. 622; 2 N. R. (Ch.) 557; 32 L. J. (Ch.) 753. 9 Jur N.S. 975,

Now, my Lords, the will in this case is that of a husband, the state of health of whose wife was perfectly well known to him, and appears to have been before his mind at the time he was making his will. That wife, by a settlement made upon the marriage, was entitled to property producing an income of a considerable or substantial amount. All those facts must have been perfectly well known to the testator at the time when he made his will, and in that state of facts he gave the residue of his property to the trustees of his will, and after directing its conversion and investment, he continued in these words:—[His Lordship read the words of the will, see *ante*, p. 302.]

My Lords, larger words than those, it appears to me, it would 2 Ch D 57
be impossible to introduce into a will. The trustees are not merely to have discretion, but they are to have "uncontrollable," that is, uncontrolled, "authority." Their discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is to be without any check or control from any superior tribunal. What is the subject-matter with regard to which they are to exercise this discretion and this authority? The subject-matter is the payment, or the application, not merely of the whole of the income of his real and personal estate, but of such portion only as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so what part. And how are they to decide, if they do not apply the whole; what is the part which they are to apply? They are to decide upon this principle, that it is to be such part as they shall think expedient, not such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefited, but such part as they shall think expedient; and upon the question of what is expedient it is their discretion which is to decide, and that discretion according to which they are to decide is to be uncontrolled.

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And, my Lords, if the trustees come before your Lordships and say to you, " We have considered the matter, and we find this lady is in receipt of an income of her own of £500 a year (or whatever the sum may be); we have taken that into account—we think that, under those circumstances, it is expedient that she should have in addition to that £500 a year such a farther sum as the Master in Lunacy has said would be adequate to provide for every comfort which, according to her state of health, she can fairly enjoy—that is the additional sum which we think it expedient should be provided out of the income of which we are the trustees; that is the portion only of the annual income of our residuary estate which we think it expedient should be applied to the maintenance of this lady." If they came before you and said this, I am obliged to ask myself, and I am obliged to ask your Lordships, what right have I or what right have you to say that that is an exercise of the discretion of the trustees which, in the face of the statement that their discretion and authority is to be uncontrollable, you are entitled to control?

My Lords, it is nothing to say to me if the Court of Chancery had under its management two funds, to one of which the lunatic was absolutely entitled, and which represented her own absolute property, and the other of which was, if I may use the expression, evanescent, and which, so far as she might not benefit by it, would pass away and would not belong to her estate, that in that state of things the Court of Chancery would save the money which was her own property and maintain her out of the other fund. I answer, that may well be the case, that may be the principle (and I make no objection to the principle, I highly approve of it), by which the Court of Chancery, where it has to exercise its discretion, deems it expedient to proceed in the exercise of that discretion. But am I entitled, in dealing with a will such as is now before your Lordships, to set up against the discretion of the trustees, which is pronounced by this will to be uncontrolled and uncontrollable, the rule which the Court of Chancery adopts for the exercise of its own discretion in a similar or in an analogous case? My Lords, to do so would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated to be uncontrollable, shall be controlled and be subjected to that rigid and unbending rule upon which the Court of Chancery acts, (for reasons of which I entirely approve,) upon those occasions when it has to perform the functions which, in this instance, the trustees, and not the Court, have to perform.

Now, my Lords, that is the whole of this case. It appears to me that the Lords Justices have been correct in their exposition of the construction of the will; and agreeing with them in the construction, I must agree with them also in the conclusion at which they have arrived.

My Lords, I cannot but think, when I look at the modification which the Lords Justices have made of the decree of the Vice-Chancellor, that some words have crept into that part of their decree *per incuriam*, because I find that after declaring that the Defendants *Gisborne* and *Bass*, " the trustees of the will of the testator, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for the maintenance of his widow," the modified decree proceeds to add, " and the Defendants, the trustees, by their counsel, concurring, their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources of the Plaintiff," " will make up the sum of" £400 odd, or £600 odd, as the case may be. My Lords, in a case like this, where the Court of Chancery recognises that the trustees and not the Court, are to be the judges of the *quantum* to be allowed, where the trustees are willing to exercise the discretion which they claim to exercise, and where the Court allows and declares their right to exercise that discretion, I do not understand it to be the habit of the Court to go on and express any opinion as to whether the exercise of the discretion by the trustees is a wise or an unwise exercise of that discretion. I understand that in such a case the Court of Chancery steps aside and recognises the trustees as the persons to exercise the discretion, and in its decree does nothing more than, with regard to payments which may be necessary, act upon the exercise of the discretion of the trustees so made. I shall submit to your Lordships that, without affecting in any manner the costs of this appeal, the decree ought to be varied in this way: After declaring that the Defendants, the trustees of the will, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for the maintenance of his widow, the decree should proceed thus, "and the Defendants, by their counsel, stating that they are prepared to exercise such discretion by paying and applying such portion of the income of the real and personal estate of the testator as with the income from other sources of the Plaintiff *Charlotte Frances Gisborne,* will make up" the sums specified in the decree, "or other the sum from time to time to be allowed in the lunacy for the clothing" &c., "or otherwise for the personal and peculiar benefit and comfort of the Plaintiff, *Charlotte Frances Gisborne,* it is by consent of the Defendants, the trustees, ordered that the Defendants, the trustees, pay such portions to the Plaintiffs, the committees of the person and estate of the Plaintiff, *C. F. G.*"

My Lords, with that variation I submit to your Lordships, and move your Lordships, that the decree be affirmed, and that this appeal be dismissed; and, unless the parties are prepared to submit to your Lordships any consent to a different arrangement, I should propose to your Lordships that the ordinary rule be followed, and the appeal dismissed with costs.

LORD PENZANCE:—

My Lords, I desire to add but very few words upon the meaning of this trust in the testator's will, agreeing, as I do, with all that has fallen from my noble and learned friend upon the subject.

The controversy really resolves itself into a very simple question. It is the choice between two opposite propositions, which I will shortly state. On the one side it is contended that the words of the will containing this trust must be so read as that your Lordships should conclude that the testator's intention was that his wife should be maintained, and her personal and peculiar benefit and comfort secured, entirely out of the proceeds of his estates. It is said that that is the intention of the trust; that though to the trustees every discretion is left as to the amount which would be required for that purpose, they are to take that amount out of the testator's estate. That, my Lords, is the view which is presented on the one side. On the other side the view presented is this: that the testator being minded, above all things, in making his will, to provide for the maintenance and comfort of his wife, and being cognizant of the fact that she had an income of her own, but probably adverting to the fact that all incomes are precarious, and not knowing what that income might be, either by way of increase or decrease upon the amount at which it stood when he made his will, he determined to provide, placing full confidence in his near relations, whom he appointed trustees, that whatever happened they should take care that out of his income, together with all other sources, a sufficient amount should be provided to secure the personal and peculiar benefit and comfort of his wife which it seems to have been his main object to ensure.

It seems to me, my Lords, that the latter is the natural and reasonable construction of this trust; and I am unable to see any words upon which the former construction can be properly supported. I find no words here from which you can conclude that the testator intended that any other sources of maintenance were to be disregarded, and that absolutely out of his own estate his wife should be supported; because all that he says is that the trustees are, in their discretion and of their uncontrollable authority, to pay and apply the whole or such portion of the income of the estate as they think expedient to the maintenance and support, or otherwise for the personal and peculiar benefit and comfort of his wife. Reading these words in their natural sense, I cannot conceive that any sort of restraint or any sort of condition is imposed upon the trustees. The object to be attained is the support of the wife and her comfort, but the means of obtaining that support are left entirely to the discretion of the trustees. The words are as strong as language can make them. If the testator had desired that a particular fund should be resorted to, he might have said so. If he had desired that any particular sum should be applied, he might have said so; but he seems to have desired solely the attainment of his object: and, subject to that object being attained, he seems to have left it absolutely uncontrolled in the discretion of the trustees how that object should be attained.

My Lords, that being so, it seems to me that the trustees exercised a reasonable discretion in first applying the lady's own

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income and in supplementing that income in the way which has been done, and which has been approved of. On these grounds, my Lords, I can see no reason for finding fault with the order made by the Lords Justices. I entirely agree with my noble and learned friend that the latter portion of the order, which appears to introduce into the case some exercise of authority by the Court, had far better be omitted, and that it had better stand in the way that has been suggested.

LORD O'HAGAN:—

My Lords, all the learned Judges who have considered this case seem to have agreed that the authorities cited at the Bar give little aid towards the decision of it. I quite concur with them. The differing intentions of testators are as numerous as testators themselves, and their modes of expressing those intentions are of corresponding variety. We can very rarely, therefore, find a judgment upon the terms of one will which has any governing application to the terms of another. We must look to the frame of the instrument before us, and gather from it, as well as we can, the purpose of the testator, which must strictly regulate our decision.

I venture to differ from the learned Vice-Chancellor in his view of the importance of the contingent beneficial interest of one of the trustees, as bearing on the argument. The testator knew all the circumstances of the parties and the character of the brother, whom he made his trustee, and in whom he vested a discretion so unlimited. He manifestly relied upon that brother's integrity and affection to secure the comfort of his wife, without any corrupt regard to his own possible advantage; and his interest, whatever it was, cannot affect our decision. I think, also, that the principle which decides as between two funds in favour of a lunatic, according to his greater interest in one of them, has no relevancy to this case. It must be ruled by the intention imputable to the testator—that intention, if clear, must prevail against such a principle, however that principle may be applicable in other circumstances. As was said by the Lord Chancellor in *In re Ashley* (1) the ruling must be in favour of the view which is for the benefit of the lunatic, if it be not opposed to the will. The real question is, What was the will? what the extent of the discretion thereby vested in his trustees by the testator?

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(1) 1 Russ. & My. 371.

On that question, I feel constrained to hold that the judgment of the Lords Justices ought to be affirmed. The words "in their discretion and of their uncontrollable authority" are as large in their operation as words well can be: they govern the subsequent portions of the clause which they commence, and taken in connection with the words which follow—"as they shall deem expedient"—they appear to me to make the power of decision absolute, and to authorize the trustees to consider and judge, conclusively, as to expediencies of every kind. It seems to me, also, that a reasonable question of expediency did arise with reference to the possession of property by the lunatic, of which the testator was well aware, as affecting the duty of the trustees in determining on the amount of the contribution to be made from the estate which they administer; and on that question their decision has not been, in my opinion, at all unreasonable. I see no reason for limiting the discretion of the trustees, or in any way quarrelling with the mode in which it been exercised.

I am therefore of opinion that the decree appealed from should, with the modification which has been proposed by the noble and learned Lord on the woolsack, be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. In the unfortunate circumstances in which the testator's wife was at the time when he was making his will, it was a very sensible thing of his adviser to say: The best thing you can do is to select your trustees carefully and prudently, so as to have trustees in whom you can place perfect confidence, and then give them uncontrolled discretion as to how the income shall be applied for the benefit of your wife and for her personal comfort. If that was the advice that was given to him, it seems to me that the words he has used sufficiently carry out that intention. I do not intend to go into any criticism of the words, except to say that they seem to me to express as strongly as any words I could myself devise, even now, when I have understood that there is a difficulty about it, that there was to be uncontrollable authority and discretion in the trustees to apply such portion of the income as they might think expedient for the benefit of the wife and her personal comfort. And, my Lords, what they have done and are prepared to do is certainly within the scope of that authority. As far as my opinion, speaking as an individual, goes, I think it is a very discreet arrangement on their part, and a very proper one. But I perfectly agree that the construction of the will is, that the trustees are to decide, and therefore it ought not to be put, as by inadvertence it has been put, in the decree of the Lords Justices, that the Court approves of the exercise of the discretion, &c. Therefore I think there should be that amendment of the decree which has been already suggested.

LORD GORDON:—

My Lords, I am of the same opinion.

Mr. *Chitty*:—My Lords, with great submission, I would venture to suggest to your Lordships a mere question of form with a view to give effect to your Lordships' opinions as they have been expressed already, and that is, that the ordering part of the decree should state that the trustees are to do this "until farther order." Unless that is provided for, the allowance will be stereotyped. There is not the least ground for supposing that there would be any alteration of circumstances, or any reason for making an alteration in the amount of the allowance, but I would humbly suggest to your Lordships that after the words which the Lord Chancellor has read, "stating that the trustees are prepared to apply such portion," and so on, you would add, "under the existing circumstances," and make it an order "until farther order," otherwise it would be an absolute order that the trustees are always to pay the sum specified.

Mr. *Davey*:—Is that at all necessary? The Vice-Chancellor's order does contain the liberty of applying to the Court; but if you consider it necessary to insert those words I do not object.

THE LORD CHANCELLOR:—Mr. *Chitty's* object would be answered by putting in that the trustees pay "until farther order" such portions, and so on.

Mr. *Chitty*:—That would exactly be what I suggest; else it would be an absolute and perpetual order.

THE LORD CHANCELLOR:—I suppose the parties have not agreed about costs.

Mr. *Chitty*:—No, my Lord.

Decree appealed from varied as proposed, and with that variation affirmed.

The Decree as varied follows the decree of the Lords Justices to the words, "declare that the Defendants, *Walter Joseph Gisborne* and *Abraham Bass*, the trustees of the will of the testator, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for the maintenance of his widow and the Defendants, the trustees, by their counsel," after which it proceeds thus, "stating that they are prepared to exercise such discretion by paying and applying such portion" [omitting here the word *only*] "of the income of the real and personal estate of the testator as, with the income from other sources of the Plaintiff *Charlotte Frances Gisborne*, will make up the said sum of £432. 16*s*. 1*d*., and the said annual sum of £696, or other the sum from time to time to be allowed in the lunacy for the clothing, board, lodging, maintenance, ease, and support, or otherwise, for the personal and peculiar benefit and comfort

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of the Plaintiff *Charlotte Frances Gisborne*, it is, by consent of the Defendants, *Walter Joseph Gisborne* and *Abraham Bass*, the trustees, Ordered that the Defendants, the trustees, pay, until farther order, such portions to the Plaintiffs, *James Harington Trevelyan*, *Louisa Mann*, and *Harington Astley Trevelyan*, as committees of the person and estate of the Plaintiff *Charlotte Frances Gisborne*," &c.; and with this variation their Lordships affirmed the decree, and ordered the Appellants to pay to the Respondents the costs incurred in respect of the appeal, and ordered the cause to be remitted to the Court to do therein as should be consistent with this judgment.

Lords' Journals, 17th April, 1877.

Solicitors for the Appellants: *Robinson & Preston.*
Solicitors for the Respondent: *Reginald Hay Wilkins.*

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[HOUSE OF LORDS.]

WILLIAM CLARK . . . . APPELLANT;

AND

PATRICK ADIE . . . . RESPONDENT.

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Feb. 23, 27;
March 1.

Patent—Combination of Old and New Forms—Specification.

6 ChD 425.
3 [illegible] Cas 57

A patent may be granted not only in respect of a whole and complete thing described, but in respect, also, of a subordinate integer of that whole.

But then the invention must be so described as to make it clear in respect of what (the whole, or the integer,) the patent has been asked for and granted.

Where a person has invented an improvement in the form of a particular apparatus or machine, but combines that individual improvement with other things which are not his inventions, his specification must claim that particular individual thing, and not leave it doubtful whether the claim is made for the whole combination, of which that thing really only forms a part.

In a drawing of a machine attached to a specification, there was shewn an intervening space, or opening, between two parts of the machine, the object of the patent; it was intended as the arching of a cutter-plate, but this was not referred to and explained in the specification. In the specification there was the statement of an evil in existing machines, and upon careful examination, by a skilful person, he might suppose that the space exhibited in the drawing was intended to obviate this evil, but there was no statement to that effect, nor was the form of the opening described, and described as a necessary quality of improvement in the machine. This form was afterwards relied on as one of the great improvements in the combination of the patented apparatus:—

Held, that as it had not been properly explained, described, and claimed, the specification was defective.

There were three other things which, with this one, constituted a combination insisted upon as a novelty. Those three things were old,—and the mere combination of the four without a clear and sufficient description of the purpose and use of that which might be claimed as new and valuable, and without a distinct claim in respect of the combination itself (even if such a claim would have been valid) was held not sufficient to support the patent.

THIS was an appeal against an order of the Lords Justices, by which a previous order of Vice-Chancellor *Bacon* had been reversed (1).

The Appellant, had devoted his attention to the construction of an apparatus for clipping horses and shearing sheep, and had made certain improvements in previously-existing mechanical contrivances employed for the same purpose, when he found that some of these improvements already existed in an apparatus made by one *Grayson*, and for which *Grayson* had obtained a patent. He became the purchaser of *Grayson's* patent, in order to be able to use a part of *Grayson's* invention in what he believed to be a new and much better clipper invented by himself; and afterwards, conceiving that this patent had been infringed by the present Respondent, who had himself taken out a patent in respect of an apparatus for the same purpose, he instituted proceedings in Chancery to restrain the alleged infringement. In form his claim for an injunction was founded upon *Grayson's* patent. The chief points of discussion in the Court below were, whether there was anything new in the forms and arrangements of the apparatus there described, such as would be sufficient to sustain the patent, and then whether what *Adie* had done really amounted to an infringement of it. It was also contended for *Clark* that if no one part of the apparatus was in itself new, the combination of the different parts was new, and produced a new and beneficial result, and that they were properly described in the specification, and therefore might properly be the subject of a patent, and could not be imitated without the patent being infringed. Vice-Chancellor *Bacon* had granted an injunction; but the Lords Justices, on appeal, decided that a patent for a combination of several improvements would not be infringed by using a combination of some only of those improvements, and ordered the bill to be dismissed. This appeal was then brought.

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(1) Law Rep. 10 Ch. App. 667, where the facts are fully set out.

SC on amendt post 423.

Mr. *Kay*, Q.C., Mr. *Fry*, Q.C., Mr. *Aston*, Q.C., and Mr. *Everitt*, for the Appellant.

The Attorney-General (Sir *J. Holker*), Sir *H. M. Jackson*, Q.C., and Mr. *Lawson*, for the Respondent.

The case here was argued on the questions whether there had in fact been any improvement on old forms, or any new combination of old or old and new forms, so as to sustain a patent; whether, if so, they had been properly described in the specification; and whether, supposing the patent to be good, there had been any infringement of it.

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The following cases were cited:—*Harrison* v. *Anderston Company* (1); *Jones* v. *Pearce* (2); *Lewis* v. *Marling* (3); *Lister* v. *Leather* (4); *Smith* v. *London and North Western Railway Company* (5); *Wright* v. *Hitchcock* (6); *Curtis* v. *Platt* (7); *Electric Telegraph Company* v. *Brett* (8); *Cannington* v. *Nuttall* (9); *Murray* v. *Clayton* (10); *Parks* v. *Stevens* (11); *Crane* v. *Price* (12); *Arnold* v. *Bradbury* (13); *Kay* v. *Marshall* (14); *Russell* v. *Cowley* (15); *Foxwell* v. *Bostock* (16); *Rex* v. *Cutler* (17): *Hill* v. *Thompson* (18).

The nature of the alleged invention, and the description of what was intended to be protected, are so fully stated in the judgments, that it has been deemed unnecessary to set them forth in this statement of the case.

THE LORD CHANCELLOR (Lord *Cairns*):—

1877
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My Lords, the Appellant in this case is now the proprietor of a patent which in the course of the argument has been called *Grayson's* patent, and the issue between him and the Respondent is, whether or not the Respondent has infringed that patent.

In order to try that issue it will in the first place be desirable, in fact it will be necessary, that your Lordships should distinctly determine what is the construction of the specification which was given in the case of *Grayson's* patent. I will state what, in my judgment, is this effect, and what the operation of that specification. As I understand the invention which *Grayson* claims to have discovered, it is this; it is styled in his words, "Improvements in apparatus for clipping or shearing horses;" in popular language I should describe it as a horse-clipper, or a horse-clipping machine. It is not "an apparatus for clipping or shearing horses;" that would not have been a new thing, for horse-clippers were old, but it is "improvements in this apparatus for clipping or shearing horses."

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(1) 1 App. Cas. 574, 578, 583.
(2) 1 Web. Pat. Cas. 122.
(3) 1 Web. Pat. Cas. 491; 10 B. & Cr. 22.
(4) 8 El. & Bl. 1004.
(5) 2 El. & Bl. 69. 17 Jur. N.S. 1071
(6) Law Rep. 5 Ex. 37.
(7) 11 L. T. (N.S.) 245; 35 L. J. (Ch.) 852.
(8) 10 Com. B. 838; 20 L. J. (C. P.) 123.
(9) Law Rep. 5 H. L. 205.
(10) Law Rep. 7 Ch. App. 570.
(11) Law Rep. 8 Eq. 358; affirmed Law Rep. 5 Ch. App. 36.
(12) 1 Web. Pat. Cas. 377, 393; 4 Man. & Gr. 580; 12 L. J. (C.P.) 81.
(13) Law Rep. 6 Ch. App. 706.
(14) 5 Bing. N. C. 492; 1 Myl. & Cr. 373; 8 Cl. & F. 245.
(15) 1 Cr. M. & R. 864.
(16) 12 W. R. 723; 4 De G. J. & S. 298.
(17) 1 Stark. 354.
(18) 3 Mer. at p. 629.

(4) S.C. 8 Jur. N.S. 814; 4 do 947

Starting with that as to the title, when you approach the description you find that this improved horse-clipper is described from the beginning to the end. The specification tells you how you are to make it from the starting-point to the close; of course, using the language known in the trade, and familiar to those who had been accustomed to instruments of this kind. As regards the advantages of this improved horse-clipper *Grayson* states them in this way; at the outset he says: "My invention relates to certain improvements in the construction of apparatus for clipping horses, and for shearing or clipping other animals, the advantages consisting chiefly in the facility afforded of clipping the hair or wool at a short distance from the skin instead of shaving the animal close" (that is an advantage which would be common to all horse-clippers as distinguishing their use from the process of shaving), "in the application of the cutting blades in relation to the comb" (that is merely a statement by anticipation of what afterwards will be found in the elaborated description), "and especially in the means of adjusting the cutter in any desired variety of position in regard to the guiding and clipping handles, whereby all parts of the animal may be operated upon with equal facility."

Before adverting to the intermediate part, I will ask your Lordships to pass on to the end of the specification. He continues thus: "What I claim and desire to be secured to me by the herein in part recited letters-patent is the general arrangement, construction, and combination of parts" (I believe that that is the only place where the word "combination" is used), "whereby I am enabled to construct an apparatus for clipping or shearing horses and other animals in such manner that the apparatus may be adjusted to numerous angles or positions to suit the varying surface of the animal, and whereby the shearing or clipping may be regulated to the exact extent required, without shaving the hair or wool too closely, and without injuring the animal, leaving a smooth surface without marks, the apparatus being capable of being taken to pieces and adjusted for sharpening or renewing the cutter bar, or for other purposes, all substantially as herein specified and shewn."

Together with that, I will ask your Lordships to observe also a statement of some importance made by this patentee at the end of this provisional specification, the instrument in which in the first instance he described the general nature of his invention. He states, after describing the instrument very much as it was described in the ultimate specification, "It may be made of various sizes, from very fine teeth for clipping horses to coarse teeth for shearing sheep or other animals, and it possesses, as stated, the advantage over all other clipping apparatus of being varied and adjusted as to cut just above the hoof, or under the flank, or the neck of the horse without difficulty or danger." Therefore, my Lords, stopping here, you will understand by this specification that it is, as I said, a description of one complete improved horse-clipper, the distinguishing advantage of which over other horse-clippers is the adjustibility, that is, the means provided by which it might be adjusted so as to follow the shape of the animal which was being clipped.

My Lords, in harmony with this, you have then, in the central part of the specification, a historical mode, an analytical mode, of describing the construction of the instrument. I will not go through the whole of that, but your Lordships will observe that it commences in this way: "The apparatus consists of a flat guide-plate on which the moving parts are carried;" then it describes the combing-teeth and the cutting-teeth; then it describes the holder or guiding-handle for the left hand, and the means by which that might be varied according to the shape of the animal; then it describes the clipping-handle. And thus it continues: "In this apparatus no bearings are made dependent on screws set in plates, and which are so liable to become loose or broken by the undue pressure exerted on them. In place of such bearings the bearings and fulcrum are taken from stems of great strength which cannot get out of order, or be broken by any work to which the apparatus may be subjected." And then commences a reference to the drawings, and the clipper is described from the beginning to the end by the drawings, and the specification concludes, as I have mentioned, by a general enumeration of the claims.

My Lords, that being upon the face of it a specification claiming this improved apparatus, or instrument, as a whole, you have then to consider in what way would a patent for an apparatus of this kind be infringed?

I apprehend that I am correct in saying that such an apparatus as I have referred to might be infringed in one of three different ways, and with reference to the numerous authorities referred to at your Lordships' Bar, it is important to bear in mind the different modes in which, in cases of this kind, questions of infringement arise. One mode of infringement would be a very simple and clear one; the infringer would take the whole instrument from beginning to end, and would produce a clipper made in every respect like the clipper described in the specification. About an infringement of that kind no question could arise. The second mode would be one which might occasion more difficulty. The infringer might not take the whole of the instrument here described, but he might take a certain number of parts of the instrument described; he might make an instrument which in many respects would resemble the patent instrument, but would not resemble it in all its parts. And there the question would be, either for a jury or for any tribunal which was judging of the facts of the case, whether that which was done by the alleged infringer amounted to a colourable departure from the instrument patented, and whether in what he had done he had not really taken and adopted the substance of the instrument patented. And it might well be, that if the instrument patented consisted of twelve different steps, producing in the result the improved clipper, an infringer who took eight or nine or ten of those steps might be held by the tribunal judging of the patent to have taken in substance the pith and marrow of the invention, although there were one, two, three, four or five steps which he might not actually have taken and represented upon his machine. Many of the cases which were referred to in the argument were cases where a question of that kind arose.

But, my Lords, there is a third way in which it is possible to conceive an infringement of a patent of the kind to which I have referred. In a patent claiming an entire instrument made by a consecutive number of steps, there may at the same time be what I will term, as perhaps the most convenient phrase I can think of, an invention which is a subordinate integer in the larger invention. Inside the whole invention there may be that which itself is a minor invention, and which does not extend to the whole, but forms only a subordinate part or integer of the whole. Now, again, that subordinate integer may be a step, or a number of steps in the whole, which is or are perfectly new, or the subordinate integer may not consist of new steps, but may consist of a certain number of steps so arranged as to form a novel combination within the meaning which is attached by the patent law to the term "combination." In that case you may have to try a farther question; you may have then to look at the patent, not merely as a patent for the whole instrument described, but as a patent which, in addition to claiming protection for the whole instrument so made, claims protection also for the subordinate invention, the subordinate integer, which enters into the combination of the whole. Suppose, my Lords, that in a patent you have a patentee claiming protection for an invention consisting of parts which I will designate as A, B, C, and D; he may at the same time claim that as to one of those parts, D, it is itself a new thing, and that as to another of those parts, C, it is itself a combination of things which possibly were old in themselves, but which, put together and used as he puts them together and uses them, produce a result so new that he is entitled to protection for it as a new invention. In a patent of that kind the monopoly would or might be held to be granted, not only to the whole and complete thing described, but to those subordinate integers entering into the whole which I have described. But then, my Lords, the invention must be described in that way; it must be made plain to ordinary apprehension upon the ordinary rules of construction, that the patentee has had in his mind, and has intended to claim, protection for those subordinate integers; and moreover he is, as was said by the Lords Justices, at the peril of justifying those subordinate integers as themselves matters which ought properly to form the subject of a patent of invention.

My Lords, let me apply those general observations to the case before you. That the Respondent in this case has adopted, has copied, the whole machine patented by *Grayson* is not contended. That he has adopted so much of the machine that what is not adopted is merely an omission to give colour to what he has adopted, and to prevent his being charged as an infringer, is not contended, because he has left out of *Grayson's* patent that which, if *Grayson's* patent is one whole, is so substantial an omission that it was not argued at the Bar that it could be said that he had in substance taken the whole. But the stress of the argument at your Lordships' Bar was upon the third branch of the case. It was said that, although he has not copied the whole, and although he has not copied so much that substantially what he has taken is the pith and marrow of the invention, still there is, in this invention of *Grayson's*, a subordinate integer consisting of a certain combination of parts going to make up a step in the whole of the apparatus patented, and that subordinate integer, being itself matter for protection, has been taken by the Respondent, and in that respect he has infringed upon the patent.

Now, my Lords, what is the subordinate integer which is said to be protected by this patent, and which it is said that the Respondent has taken? It is described by the learned counsel for the Appellant at your Lordships' Bar, as consisting of four different matters, viz., in the first place, what have been called the fixed stems, springing from the under or comb-plate, which cannot be shaken loose; in the second place, the nuts and washers applied to the top of these fixed stems, above the cutting-plate, so as to adjust the friction; in the third place, the shape of the cutter-plate made in an arch, by which the bearing of the cutter-plate upon the comb-plate is better adjusted; and, fourthly, the mode of communicating the motion to the upper or cutting-plate, so as to bring it to the true line of cutting.

Before I refer to the first, second, and fourth of these items, I wish to observe upon the third, namely, the question of the arching of the cutter-plate. Whatever conclusions may be arrived at upon the other items, to which I shall advert afterwards, I think your Lordships will agree with me that this question of the arching of the cutter-plate must be put entirely out of the case. I have read with great care the specification of *Grayson*, and there is not a word in the letter-press of that specification, from beginning to end, which refers in any shape or form to the arching of the cutter-plate, or to any advantage to be derived from that arching. It is perfectly true that when you turn to that drawing, which exhibits a part of this instrument in profile, and look at the cutter-plate, which in *Grayson's* patent lay under a somewhat thick and rigid bolt, you can see in the profile of that cutter-plate as drawn a certain amount of arching, or rather, I should say, a certain space intervening between the back portion of the cutter-plate and the comb-plate immediately below it; but what that intervening space is for, or why that particular form is given to the cutter-plate, is nowhere suggested in the specification. I mean nowhere suggested directly and categorically.

A suggestion is, indeed, made in the specification, which I cannot help thinking refers to this conformation of the cutter-plate, but which would indicate that that conformation is given for a purpose entirely different from that which is said to be the real advantage of the arching of the cutter-plate. It is pointed out in the specification that in previous cutters there was a tendency for grit, or small foreign matter of some kind, to come in between the cutter-plate and the comb-plate, to cause friction, and to cause fraction of the combs; and it is impossible not to entertain a very strong suspicion, on reading this statement in the specification and looking at the drawing, that the meaning and object of the patentee was to make this recess or cavity between the cutter-plate and the comb-plate at the back, in order that such grit, or foreign substance as I have described, might in the course of the movement of the clipper fall back from between the cutter and the comb-teeth into this cavity, and thus be liberated from the apparatus altogether. That may have been the object of the cavity, but there is no distinct statement made of why the arching is produced.

And, my Lords, an observation was made at the Bar on behalf of the Respondent, which I cannot help thinking has very great weight, that looking at this drawing it is impossible to conceive, whatever might be the object of this arching, that it was intended to bring into operation any elasticity of the cutter-plate produced by the arching, because in this very drawing this cutter-plate in

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this arched form is laid upon, and is adjusted and fitted to, a solid and rigid bolt above it, so that the elasticity of the cutter-plate is just as great as, and nothing more than, the elasticity of this bolt, and inasmuch as the bolt is solid and rigid and non-elastic, an instrument made according to this drawing would not have, and could not have, any elasticity whatever in the cutter-plate.

Therefore, my Lords, I am compelled, in the first place, to put aside altogether this idea of the advantage of the elasticity of the cutter-plate as an after-thought, which was in no way present to the mind of this patentee. It may be an advantage—I say nothing as to that—but if it is an advantage, it is an advantage which subsequent practice and experiment has brought to light, and it is not an advantage which appeared to suggest itself to the mind of this patentee when he made this specification.

Well, my Lords, I turn to the three remaining items which, if any, must be said to produce the combination; and in the first place with regard to those items, as I view the evidence, it appears to me that they are all in themselves old—no one of them has in itself the advantage and property of novelty. First let me take the fixed stems which cannot be shaken loose. It is quite true that in the earlier clippers you had screws passing through from above—passing through the cutter-plate and into the comb-plate, but they were naturally found to shake loose and to be inconvenient. And then you had as a second stage an improvement, bolts passed through from below—from under the comb-plate into the cutter-plate above, and secured above the cutter-plate by nuts—that was an ordinary improvement upon a screw which would naturally occur to any one. Those bolts were not fixed; they were put in, and they could be taken out again, and there may have been a disadvantage in the want of that rigidity which would have arisen if they had been soldered or welded into the comb-plate. But before this patent was taken out that inconvenience appears to have been felt and to have been surmounted. This is shewn by two exhibits; one is the exhibit of *Clark* of 1869, in which the cutter-plate is worked upon the comb-plate by a motion which is somewhat different from the present; you have there the fixed stems proceeding out of the comb-plate and passing through the cutter-plate, and secured on the top by nuts and by washers, just as in the case of the present patent; the other is the exhibit of *Adie*, of 1868; in that case, although in other respects the clipper is different, still you have got the fixed stems fastened into the comb-plate, and passing through the cutter-plate and secured by nuts at the top. You therefore have the fact that a fixed stem was not a new thing in a clipper, although it may not have been combined with the things with which it is here combined before *Grayson* took out his patent.

With regard to the application of nuts and washers to fixed stems, what I have already said shews that that also was not new. In the exhibit of *Clark* of 1869 you have nuts and washers as completely the same as the nuts and washers of the present clipper as anything can be.

Then as regards the mode of communicating the motion so as to be in the true line of cut, I cannot, I must say, see any substantial difference between the mode in which the motion was communicated in the earlier clippers and the present. The motion in the earlier clippers proceeds, as here, from a pivot which attaches the two handles; from that pivot is worked a cam which is applied exactly in many cases in the true line between the two screws; and although a cam so applied does not work exactly in a parallel plane, but works as the radius of a circle would work in an arc, the same may be said of *Grayson's* patent, where the action proceeds in the same way from the point of connection between the handles, and where, although it does not work by a cam, but by a pivot producing exactly the same result, the motion is also the motion of a radius working along a part of the periphery of a circle.

Therefore, my Lords, each of these three items is not, in itself, a new invention, but is an old step well known in the making of a clipper.

But then, say the learned counsel for the Appellant, that may be so—it may well be that each of these items is old, but we claim a combination in one and the same clipper of these items which never were combined before, and that combination we claim to be in itself an invention and to be protected.

I do not desire to ask your Lordships to decide in this case anything more than is necessary for the disposal of the case itself. It has always appeared to me to be a matter of very great difficulty to say as regards combination what things old in themselves might yet be combined in such a way as to form the proper subject-matter for a patent of invention; but I think your Lordships will not find yourselves embarrassed with any question of that kind here. I desire to leave, entirely without any observation from me, at all events, what ought to be said if this patentee had claimed as a new invention, as a thing to be protected, the combination into one clipper of these three old matters to which I have referred, which he would say had never been combined into one clipper before—I repeat I desire to leave untouched what ought to be said to a claim of that kind, but in this particular case no such claim has been made. I have read and re-read with the greatest anxiety the specification in the present case. I cannot find, from beginning to end of it any sentence, or any number of sentences, as to which, by any reasonable interpretation, you can say that they make a claim to a subordinate combination of these particular items as constituting in itself a novelty, a new manufacture, a thing to be protected by the patent. It appears to me that the idea of this subordinate combination in this case has sprung out of the very great ingenuity of the professional advisers of the Appellant—feeling themselves considerably pressed by the difficulty of supporting the allegation as against the present Respondent on any other ground. But putting aside the ingenuity with which the proposition is stated, and coming to a calm and deliberate perusal of the specification itself, the idea of this combination as a thing claimed or protected under this patent appears to me entirely to vanish.

My Lords, I am quite satisfied, so far as I am concerned, with the judgment of the learned Lords Justices, and I should have been content to rest the decision of this case upon that, but that the importance of the case to the persons concerned made it appear to me to be right that I should endeavour to express at some length the grounds upon which I arrive at the conclusion at which I have arrived. My Lords, I cannot do otherwise than submit to your Lordships the motion that the decree now appealed against should be affirmed, and this appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, it is very much to be regretted that a machine which is described by the Lords Justices as being one remarkably successful and useful in its results, and which in its present state was intended by the Plaintiff to be protected by his letters patent, is by those letters patent so described and claimed that it is impossible, as it appears to me, to say that the Defendant in this case, the Respondent at your Lordships' Bar, has infringed, by the making of his machine, any portion of the patent right duly vested in Mr. *Clark* as the assignee of *Grayson's* letters-patent.

Now, my Lords, there is no doubt more difficulty in all patent cases which come before the Courts where the patent is claimed for an improvement than in the ordinary case of a patent claimed for any new invention, in which you have simply to try the question of whether it is new or not. There is a mixture of old and new in all bases of patents for improvements which has occasioned a good deal of difficulty to the Court which has to decide the question. One may exemplify the two sides of that difficulty by the case of *Lister* v. *Leather* (1) on the one hand, and the case of *Foxwell* v. *Bostock* (2) on the other.

In the case of *Lister* v. *Leather* (1) it was decided that in an improved machine, the result of several combinations, the patent might be so claimed that the several combinations leading up to the one combination might be themselves divided into several parts, in which each specific combination, say A and B and C, might be considered as a separate integer, to use the expression of my noble and learned friend on the woolsack, and each such integer might in itself be a subject of letters-patent, and also in their combination, the several inventions, A and B and C, might produce a total which should also be a subject of letters-patent. My Lords, I have not the case of *Lister* v. *Leather* (1) before me at this moment, but I can so far state what was intended to be decided by that case as to conceive that in that, as in other cases, there may have been several separate portions of work to be done by the different portions of the combination producing the new machine, and that, as in the case of the feeding apparatus, each of these separate totals may have been the result either of a new invention in itself, or of a combination of old inventions, and when you had so framed your patent as to claim the combination of the feeding portion of the machine you might go on to describe the several other portions of the machine which delivered the food into it, and rendered it fit for use.' Calling one A and another B, you might say that both A and B were not new inventions, but that the combination of them was new producing the total result; and then you might say that the two put together formed a machine which was new in its result, and at the same time useful.

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(1) 8 El. & Bl. 1004. 3 Jur N.S. 814 & 947

(2) 12 W. R. 723; 4 De G. J. & S. 298.

On the other hand, my Lords, the case of *Foxwell* v. *Bostock* (1) which has some, and I may say considerable, application to the present case, decides this, that where you take a well-known machine (as the sewing-machine was in that case, and as the horse-clipper was in this case), an instrument which was well known before the date of the patent, you may, if you think fit, improve all the various parts of that machine by introducing into two or three of its definite parts, if there are so many, that which is new either by way of combination, or by way of discovery, and you may claim for each of those parts into which you have so introduced something new, the privilege of protection, just as if you had taken out letters-patent for each of those new things separately—and you may claim for those parts A, B, and C, which, considered as separate things, are in themselves deserving of a patent—you may claim for them, when united a beneficial result which may entitle you to a patent for the whole machine. But I apprehend, my Lords (and I do not read the decision in the case of *Foxwell* v. *Bostock* (1) as deciding more than I am stating), you must in some way or other inform those whom you are dealing with, by which I mean the general public—whom you wish to exclude for a certain limited number of years from using your invention—you must inform them, in some mode or other, whether you have subdivided, if I may use the term, your machine into those separate parts and claim for each part the merit of novelty, or whether you are simply making a combination of things *per se* old, but which have never been used before in combination, and which make up, as you say, your machine, for which you claim protection as a novel and useful machine, and which machine must not be made by anybody but yourself. If you claim protection also for a portion of the machine you must make it plain, I do not say necessarily by words, or by any particular mode, but, in some definite mode or other, you must point out what is the combination of parts which you ask to have protected, and what are the subordinate parts which also you ask singly and respectively in themselves to have protected.

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(1) 12 W. R. 723; 4 De G. J. & S. 298.

My Lords, notwithstanding the able argument which we have heard at the Bar upon the letters-patent of *Grayson*, I have looked in vain at that patent to find any claim of that description. I find a claim for the whole combination, in which he says he has made an improved horse-clipper, but I do not find anything which can lead one to say that he makes such a claim as this: "Here are specific novel subordinate combinations which, when brought together, produce the whole, and which also *per se* possess such an amount of novelty, either in respect of invention or of combination (whichever of the two it may be) that I am entitled, if I thought fit, to have a patent for each of them as a separate invention." The nearest approximation to a separate subdivision of the claim is in regard to the apparatus for shifting the handle in order, as the claimant says, to enable persons to clip the various parts of a horse in whatever position those parts may be, and according to the various shifting positions. There seems to be something like an amount of separation in that part of the apparatus which approaches more nearly to a separate claim in that respect, inasmuch as *Grayson* has told you, both in the provisional specification and in the full specification, what are the two objects which he has "chiefly" (as he terms it) in view. The one object is that of clipping, and not shaving, the horse, which object in fact, as has been observed already, is common to every clipping machine, because the object is to clip, not to shave; and the other object he has is to adapt the apparatus to the clipping of any part of a horse with safety. As regards this adaptation of the apparatus to the clipping of any part of a horse with safety, the Respondent has not dealt with that in any way, nor does it appear, in fact, that the Appellant himself in this case is so satisfied with that part of his invention as to induce him to continue making it an important part of his clipper. He appears now to make his clipper without using that part of his combination or discovery. And certainly whether he does use it or not, it has not been infringed or interfered with in any way by the Respondent.

Then, my Lords, we come to the other part of it, if this is to be taken in two parts, for I cannot discover the semblance even of any *tertium quid* put before us as to which there is any allegation with regard to infringement; and, as regards the only remaining part that I can discover, it is enough to say that the actual clipping work is done by the clipper independently of the question of inverting the machine, or changing the handles in order to apply the clipper in accordance with the shifting positions of the horse.

My Lords, something was said in the course of the argument upon that part of the letters-patent which speaks of it being desirable that there should be a bevilling, as I should call it (I think it has been called a "tapering" here), of the teeth of the comb, so that the comb should rest for its base, or that which supports it, upon the surface of the animal, whilst the teeth of the comb should be a little raised off that surface. If that was meant to be relied upon as anything separate and distinct, and as an entirely new combination or invention for the purpose of clipping and not shaving the animal, I apprehend that the Plaintiff would be placed in considerable difficulty, because undoubtedly it appears, upon looking at some of the specimens which we have had put before us here, that he would not have made out that that part of his invention was new—I think, my Lords, that that is clearly proved by some of the specimens which we have had put before us. But besides that we really do not find with regard to that part of the case that the Appellant in any portion of his bill, or in the affidavit in support of his bill, makes that any serious part of the charge he brings against Mr. *Adie*, the Respondent, in respect of the invasion of his (the Plaintiff's) patent.

The gravamen of the charge throughout has been the alleged piracy of the invention of the Plaintiff in the use of fixed stems instead of moveable screws; and then there is the question as to the elasticity of the arch as compared with what is called the rigid position of the two plates as put together in *Adie's* patent of 1868; and the third ground principally insisted upon here has been the production of the movement which is called the true motion, that is to say, the motion given to the machine itself and the motion given to the screws being all in one line parallel to the comb as distinguished from having the centre of motion between the two studs which are moveable, and as to which it is said that as defined in *Adie's* original machine the centre of motion was below them, and therefore a turning or twisting effect was produced when they were moved, which was supposed to be objectionable as loosening the screws.

Those were the principal matters alleged to be claimed in this patent, but I cannot find, and here I agree with the Lords Justices, any distinct portion of the specification in which a sub-combination is represented as being something independent of the machine called a horse-clipper, where the whole is produced, of which it is claimed as a subordinate part newly combined with others, and as being such a novel sub-combination as would entitle the Plaintiff to say: "I might have taken out my patent if I had been so minded for each or either of those parts which I employ in order to produce the proper operation as between the cutting apparatus and the comb, by which the cutting apparatus is guided." I find, my Lords, that what is described is the whole machine, and that it is not described at all as being a machine composed of all these several parts, which parts are in themselves new in discovery or combination, and accordingly entitle the patentee to say, "As to this or that part alone I could have taken out a patent." Whether he might, or might not, have done that, if he had been so minded, it is enough to say that I cannot find any part of the specification in which he has made such a claim. I am much inclined to agree with the Attorney-General in that part of his argument in which he said that this gentleman advisedly did not make these separate claims, because if he had claimed all those separate combinations he would, in all probability, have found it very difficult to shew that he had not been anticipated in those parts of the machine. At all events, he does not take upon himself to say that any new apparatus has been constructed by him in the sense of novelty as distinguished from new combination. What he claims is only a combination of parts which are old and well-known, and which have been used before by many. He says, I have put together those parts in a combi-

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nation which in itself is new; and he says: for the infringement of that combination I now seek to have an order of the Court. I wish to restrain the Defendant from further infringement.

It appears to me, therefore, my Lords, that he has not made out that claim as being upon the face of his letters-patent, inasmuch as all he has claimed there has been for the whole machine, such as it is, produced in its total result as a horse-clipper; and having done that, he cannot now, in suing the Plaintiff, claim, in the manner in which he has attempted to do in this case, relief in respect of an infringement of these subordinate parts of the whole combination.

As regards the arching, the question has been so fully dealt with by my noble and learned friend on the woolsack, that I have nothing to add upon that subject. I think it is only an instance of how this gentleman has, by an afterthought, sought to protect himself, as it appears to me, by an extension of his letters-patent; an extension which, if it had appeared upon the face of the letters-patent themselves, would probably have vitiated the whole patent *ab initio*.

My Lords, the case of *Seed* v. *Higgins* (1) is one which I have always thought exceedingly illustrative of the great difficulty which patentees are put to; and it appears to me to shew very strongly why it is that in this case the Plaintiff has not shaped his claim in a manner which would answer the purpose he has endeavoured to support by argument. The decision there was very fully considered by Lord Chancellor *Campbell*, Lord *Cranworth*, Lord *Wensleydale*, and Lord *Chelmsford*. There the Plaintiff was put to this extraordinary difficulty: he first claimed an improvement by using centrifugal force in the winding of bobbins; he then found that having been anticipated as to the use of centrifugal force, he could only claim in respect of a certain weight which was moved by centrifugal force in a given position, and he disclaimed all except that weight. When another person sought to substitute what was a mechanical equivalent for the weight (it was not applied in exactly the same place, or the same position, but the effects were almost the same), the Court came to the conclusion that the very disclaimer itself shewed that the Plaintiff was only

(1) 8 H. L. C. 550. 6 Jur NS 1264

claiming the exact thing which was left open to him by the numerous other patents which had been taken out for the application of centrifugal force; and that although the Defendant had come as near as could be conceived to an infringement, yet he had not actually violated or infringed the patent, because the patent must be confined very strictly to what was expressed in it—that is to say, very strictly to the application of the weight there mentioned. It is upon that ground, no doubt, my Lords, that the patentees have been in great difficulty, and this gentleman (or those who advised him) appears to have felt that difficulty when the specification was framed. Without saying a word against the validity of the patent as it exists, it appears to me that in consequence of that difficulty he has not (perhaps wisely for himself) made that larger claim to which I have referred, and he has not included in his claim that which can cause your Lordships to consider Mr. *Adie* as an infringer of the patent.

LORD BLACKBURN:—

My Lords, I also think that in this case the appeal should be dismissed and the judgment of the Court below affirmed.

In these cases of patents there always arise three principal matters to be considered. The letters-patent are in themselves a grant of a property in an invention, and one question which always arises is, is the invention, in which the property has been granted, such an invention as that, under the *Statute of Monopolies*, the Crown can grant a property in it. The second question is whether or no the patentee has complied with the condition which has for nearly two centuries been always inserted in letters-patent, and has "described and ascertained the nature of the invention" in his specification. The question whether he has done that or not must of course depend upon the construction of the specification, such as we see it is, and that must be a reasonable construction. The effect of the specification necessarily is that it defines and limits what is the invention which he claims. He cannot say that he has more than he has described in his specification as being the invention in which he says he has property. Others may shew, perhaps, that his invention is not fully described, but *he* cannot say more than that. Consequently, it is always a question upon the true construction of the specification, what is the invention which there appears. Then comes another question. If his specification is such as I have said, and if he has complied with the condition, and if the invention is one in which he can have a property conferred upon him, is what the Defendant has done a taking and using a part of that property? The letters-patent grant the exclusive property, or rather the exclusive right of using the property, to the patentee. Has what the Defendant has done been a use of that property?

Now, my Lords, all these questions are such that no man can possibly answer them in a satisfactory manner until he has understood the facts of the particular case. It is frequently necessary to have evidence to understand what is the working of the machine or what is the invention which the patentee says is his property; and that being done, the tribunal which has to decide upon the case is in a position to answer the question whether or no it is such an invention that the Crown can grant a property in it; whether or no it has been so properly described and ascertained in the specification that the condition to that effect has been complied with; and, lastly, whether or no what has been done is an infringement of the property of the patentee by a use of that invention. When that is done, in most cases the law is sufficiently clear to render it not very difficult to decide the case.

I say "in most cases," because there are some points, one of which arises in the present case, upon which there is some, indeed I may say considerable, difficulty. For instance, taking the question whether or no the invention described is the subject-matter of a patent such that the Crown can grant the property of the sole use of it, there arise questions, most frequently in what are called the cases of combination, as to whether the alleged invention is or is not a subject of a patent. The principal point there is whether there have been novelty of invention and a new and beneficial result, and the application of that to particular cases is sometimes very difficult. Long ago Lord *Abinger* used the expression that while a thing might be new and in one sense beneficial, it was not necessarily a subject for a patent.

My Lords, there are other cases in which the principle has been acted upon which Lord *Eldon* first enunciated in the case of

Hill v. *Thompson* (1), namely, the principle that old things used in a combination producing different or new results may be the subject of a patent. We have not before us, as has been already said, a case of that sort. I may just mention, as illustrating that, the case of *Crane* v. *Price* (2). That was a case where a hot blast, which had been applied as a means of melting iron by the use of ordinary coal, was first applied to melting iron in *Wales* by anthracite coal, and thereby produced an enormous benefit, for it utilized the whole of the great Welsh coal-field. In that case there was a considerable difficulty in saying whether the patent was good or not, but it was held to be good. That case has gone as near the extreme end as any decided case has gone; it shews that an old combination, if producing a new and beneficial result, may be the subject of a patent. Whether it is so or not must depend upon the facts of the particular case, and again whether it is properly described or not must depend upon the facts of the particular case. In those cases there is great difficulty in saying how much must be described in the specification, and to what extent the combination must be described. I incline to agree with what was said by the Exchequer Chamber in the case of *Lister* v. *Leather* (3), that you cannot decide in the abstract whether the using of two parts, A and B, of a combination of A, B, and C, is or is not using part of that invention, nor can you decide in the abstract the other question, which was somewhat discussed in the case of the sewing machine (4), whether or no the specification shews that A or B is sufficiently claimed as a part of the invention or not. I do not think that either of those questions can be decided in the abstract. I would wish, like the Exchequer Chamber in *Lister* v. *Leather*, before deciding it to have before me the nature of the machine, in order that I might see what A, B, and C are, and what is their relation to each other. When I had seen that, and when I had seen the specification in which it was described, I might perhaps have a difficulty in answering the question whether the use of A and B was or was not an infringement, or I might have a difficulty in saying whether A and B were sufficiently described in the specification to comply with the condition as being a part of the invention. I might have a difficulty, I say, in saying that; but I should be in a position to be able to answer the question. I do not think, my Lords, that it is easy to lay down an abstract rule; perhaps it might be done, but I should be very unwilling to try to do it, and certainly in the present case I do not think it is necessary, for I quite agree with what the learned Lord Justices say, that whether or not that which the Appellant *Clark* has made would be a combination which might be a subject of a patent (and, like the noble and learned Lord on the woolsack, I intend to abstain from expressing any opinion upon that), what *Grayson* has described in his specification is in no proper sense of the word what I should call a combination producing a new result.

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(1) 3 Mer. 622.

(2) 4 Man. & Gr. 580; 12 L. J. (C.P.) 81.

(3) 8 El. & Bl. 1004. 3 Jur. N.S. 811. [illegible] 947

(4) *Foxwell* v. *Bostock*, 12 W. R. 723; 4 De G. J. & S. 298.

Now, my Lords, I come to the facts of this particular case. It is very plainly stated by Mr. *Clark* in his own affidavit how the case arose. *Grayson* had taken out his patent in 1869; *Clark* had never seen or heard of that patent at all. *Clark* was looking after his own machines and making them; he made and invented this machine which *Adie* has used, and which, I think, the evidence shews very strongly, for whatever reason, was a better machine than had ever been used before—a machine which works lightly and easily without getting out of order. He invented it and publicly used it for two years, I think from 1869 to 1871; and at some period, I think it is not precisely stated at what period, of this public user of it, his attention was called to *Grayson's* patent, and he discovered that he had been unwittingly infringing *Grayson's* property. He then bought *Grayson's* patent, and he says now to the Defendant, "I had been unwittingly infringing *Grayson's* property, and *Grayson* might have sued me for it; now you are copying me; you are not copying *Grayson;* you are not stealing from him, for you were not thinking of him; you are copying me, you are infringing what was *Grayson's* property, and is now mine; I will therefore stop you." If he is right in his fact that he (*Clark*) was formerly infringing *Grayson's* property, he has a right to say that he will stop the Respondent from doing so too.

But there has been a fallacy running through a great part of the argument on behalf of the Appellant in this case, which I cannot help observing upon. It is said that inasmuch as this machine which *Clark* made, thereby unwittingly and unintentionally infringing *Grayson's* property, has been proved to be a very useful one, therefore *Grayson's* patent is proved to be for a useful invention. I think that that is a fallacy—it is nothing of the sort. Then again it is argued, and I think the Vice-Chancellor adopts the argument in his judgment: You (*Adie*) have adopted *Clark's* invention literally, completely, and totally, and, as *Clark's* invention was unwittingly an infringement of *Grayson's* patent, you have infringed *Grayson's* patent, and you have so made evidence against yourself that you have done that. Now, my Lords, that is not so at all. Wherever a man, knowing for the first time of an invention, either by seeing a machine at work or by reading a specification, proceeds to do what he never did before, and takes a part of the invention, it is always a very strong *argumentum ad hominem* to say: You are by the very fact of taking this making evidence against yourself that it was a new invention; otherwise why did you take it? you are making evidence against yourself that at all events the part you took was new, or why did you take it? And wherever there is a case of theft or stealing knowingly, that observation ought to have some weight, although I think in practice it has more weight given to it than it ought to have. But where there is a case of an innocent infringement of property by an unwitting use of this sort, that observation can have no weight against the party in the slightest degree, and I think it ought not to have any.

Now, my Lords, after listening carefully to the arguments and reading all the evidence, as I have done, for the purpose of understanding what the invention is, and what the machinery is, we have to see—does *Grayson* in his specification describe the nature of his invention and the manner in which it is to be carried out? Does he describe it so as to shew that he claimed that this or part of this was his property under the patent? And if he does that, is what has been done an infringement of his patent? Now, in order to know that we must look at the specification itself to see what is done there.

In the first place, I may dispose at once of one point. Part of

Grayson's specification says, "the points of these teeth" (of the comb) "are so tapered as to be slightly above the under level of the plate whereby the skin of the animal is protected from injury." In the argument at your Lordships' Bar, that was relied upon. It was said that the teeth of *Adie's* comb were not tapered up exactly in that way, but that they were so blunted and raised that they prevented the skin of the animal being injured. It was urged, I think, for the first time at your Lordships' Bar, that that was an infringement. Now, my Lords, I think the answer to that is very clear and short. From the very first time that a cutting-machine was used on a horse, there must always have been something done which would prevent the teeth of the comb from running into and pricking the animal. If the first time a comb was used upon a horse the teeth were not in some way prevented from running into the animal, you may depend upon it that the horse would by his vehement remonstrances have pointed out that fact, and it would have been remedied in some way or other.

My Lords, there is not any statement either in the pleadings or the evidence in which it is anywhere said that the tapering of the teeth of the comb which is mentioned in the specification was done by the Defendant, by the now Respondent. Looking at the models of the machines, we see that his teeth are turned up, not in precisely the same way, but in a way which would have the effect of protecting the animal's skin from injury. Therefore, if there had been any averment made, either in the pleadings or in the evidence that that was an infringement, I have no doubt that it would have been easy to shew, what is not shewn, that that was old. That being so, my Lords, I think it is not open now to the Appellant to say: Here is something which is an infringement, although I have never said that it was an infringement until now. And I also agree that it is not open to the Respondent now to say: This tapering is old, and therefore if you have claimed it, I upset the patent on that ground. Therefore, my Lords, I put that matter of the tapering out of the case altogether.

The next thing as to which there is said to be an infringement is the plate being made with a curve so that it is elastic. I am not sure that I understand this, for it is a part of the case that I have not looked at so attentively as the rest, but, as I understand it, part of the merit of the machine for which the new patent was taken out is, that the curved plate being elastic, the pressure upon the comb is slight and is regulated by that elasticity, if anything happens which would otherwise occasion a jolt, that elastic plate gives way a little, and consequently there is not a jar, and regularity is maintained. Now we have to look at *Grayson's* patent in order to see whether that merit is claimed in any part. It is admitted that throughout the whole of the letterpress there is never an allusion to any curved or elastic plate at all, but in one of the figures, figure No. 2, in profile, there does appear a curved plate, and it is said that the fact that there appears a curved plate upon that figure is enough to indicate that in the description of his invention *Grayson* described that curved plate, and claimed it as part of his invention.

Now, my Lords, I will not stop to inquire how far a mere picture may be a description of an invention and help the letterpress—it may be so to some extent—how far I do not stop to inquire. But upon that drawing there is represented a curved plate with a curved bolt attached to it in a way which if it were carried out according to the drawing would prevent the elasticity. If the curved plate had a curved bolt attached to it in fact as it has in the picture, there would be no elasticity at all. The curved plate could not give way so as to bring the elasticity into play with that bolt riveted upon it in the way shewn in the picture. I had not noticed that until the Attorney-General pointed it out in the course of his argument, but then it seemed to me to be decisive; for whatever you may say about the picture being part of the description, and so bringing the curved plate within your invention, when the only drawing which shews a curved plate shews that curved plate in a position in which it would not give elasticity, it seems to me to be quite plain that you cannot say that the advantage resulting from a curved plate was contemplated as being included in the invention at all. Therefore it seems to me that the merit of the curved plate must be thrown out of the question altogether, and that that is no part of *Grayson's* invention.

Then, my Lords, it is farther said, and this is true, that *Grayson* does state that he makes his machine with a strong stem, and avoids having any bearings upon screws, which were apt to get out of order, and he makes that strong stem with bolts and washers which are not liable to get out of order. It has been proved to us quite clearly by the models and instruments which have been produced that a great part of that was old. In one exhibit in particular we find that there had been nuts and washers used for the very purpose of giving strength. Those were (and that is the only thing that has been pointed out as a difference) fixed upon screws which came through the lower plate and not upon stems which came to the lower plate, and I suppose it may be conceded that a stem is stronger than a screw, consequently if this part had been claimed by *Grayson* at all he would have said: Part of my invention is that in a clipping machine I use a rigid stem of considerable strength for the purpose of producing strength. I think if that had never been used in a cutting machine before, it would not have been a subject-matter of a patent. But to do *Grayson* justice, I do not think he does mean to claim this. I think in the description of his invention, in which he was bound to give everybody all the information possible as to how it was to be used, he does not mean to say: It is part of my invention to make this strong, and therefore I use stems. He says: My machine is apt to get out of order if it shakes, as it will if made with screws, and therefore I warn you, not as being part of my invention, but as a means of using my invention, you must take care to make it strong; you may make it strong in any way you like; the way in which I prefer to make it strong is by this use of stems. That, my Lords, is what I think he meant to say; and, consequently the use of stems with nuts and washers would not upset *Grayson's* patent upon the ground that he was using an old thing. In describing how the machine is to be worked he says: It is material and necessary to see that it is worked so that it shall not shake and get out of order, and this mode of effecting that is the best I know of for that purpose. If that is so, it would certainly be no infringement of his property to take that, as has been done in the present instance.

Nor, my Lords, would it, I think, be an infringement, if in fact it be a benefit, which I am not so clear about, that the cutter moves in a straight line instead of, as is often the case, with a little shaking motion, being kept in position by certain slots. I cannot find anywhere in *Grayson's* specification that he asserts that he has invented this with regard to the motion in a straight line; he mentions that sort of motion, and he mentions slots as being probably the most desirable way of doing it; but I cannot find that he anywhere claims that as part of his invention.

Then, my Lords, the final result is that I come very much to the conclusion which the Lords Justices have expressed, namely, that what *Grayson* has claimed as his invention does not include these things at all, and therefore there is no infringement. Consequently it is quite unnecessary to express any opinion whatever upon the doubtful points,—the points upon which the law is not so clear that there may not be great difficulties at times in applying it. I quite agree with what my noble and learned friend the Lord Chancellor has said, that it is not desirable to say, and I do not intend to say (in truth I have not made up my mind upon it), whether or not the thing which *Clark* claimed could be made the subject of a patent as being a new combination of old things producing beneficial results. I mean to express no opinion upon that Nor do I express any opinion upon the abstract question of how much description there should be in a specification in the case of a combination, how much description of a part of the combination to constitute a claim for it as part of the invention, so that a user of the subordinate part would be an infringement. It is sufficient to say that no such question arises here.

My Lords, if I am correct in the view I have taken of the construction of the specification and the working of the two machines; if I have rightly understood those which are matters of fact, it would seem to follow that what has been done by the Respondent is no using of any part of the property given to *Grayson* and now vested in *Clark*. And if that be so, it follows of course that the appeal should be dismissed, and the judgment of the Court below affirmed.

LORD GORDON:—

My Lords, this case has received such careful consideration in the Court below and by your Lordships who have already spoken, that I think it would be superfluous in me to detain your Lordships at any length. The question is one which of course involves a great deal of difficulty, as in all these patent cases there are difficulties to be found with regard to the necessity of specifying what is the intention of the party seeking a monopoly as against the public, and the burden which is imposed upon him of disclosing clearly and distinctly to what extent he intends his patent to go. There is no doubt whatever that there may be a patent right in a combination, and there may be a patent granted for improvements in machinery, but in order to carry out the patent in a legal and proper manner there ought to be distinct intimation given to the public of what was the intention of the party proposing to take out the patent, with a view to prevent others infringing upon what he claims as his invention. There may possibly be cases of subordinate combinations protected by a patent, as my noble and learned friend on the woolsack has explained; but in the present case it does not appear, looking at least to the terms of *Grayson's* specification, that he intended that protection should be given to him in reference to any such subordinate combinations as have been submitted to your Lordships from the Bar. I think that is clear.

It is unfortunate for Mr. *Clark*, who certainly has brought this machine to very great perfection, that he is obliged to rely upon *Grayson's* patent as justifying him in suing *Adie* for an infringement of his alleged rights as a patentee under *Grayson's* patent, for he is obliged, in order to prevail in the suit which he has raised against Mr. *Adie*, to shew that *Grayson's* patent did protect certain of those alleged subordinate inventions or combinations, and I venture to think that he has failed to do so.

I think the matters which were placed before us most strongly were the alleged improvements arising from the abandonment of the use of screws, which produced a certain degree of looseness in the machine, and the adoption of stems with a different kind of machinery which is mentioned in the specification, but I do not see that this is brought forward on the face of the specification as one of the subordinate improvements which *Grayson* intended to claim the benefit of the patent for.

Then, with reference to the arched plate I must say that, while it is quite competent to a patentee to make a specification by reference to plans which are attached to the specification, it is his duty to give some idea or explanation of the use of some parts of the machinery which is not quite so obvious on the face of the plan itself. Now I venture to say that there is not, from beginning to end, anything to shew that the elasticity of the cutter-plate was one of the objects sought to be protected by the patent. I think that that rather appears to have been adopted in the course of the discussion of the case, and that it was not in the mind of *Grayson* when he originally lodged his specification. Therefore I think that the arched cutter-plate may be dismissed altogether as not being an invention or sub-combination originally claimed.

Upon the whole, my Lords, however one may regret the want of success on the part of Mr. *Clark*, who has completed undoubtedly a very excellent machine, yet he cannot obtain the protection of a patent except by claiming through *Grayson's* patent; and I do not think that *Grayson's* patent does disclose, upon the face of it, those sub-combinations which are now submitted in argument to your Lordships, and in respect of which it is said that there has been an infringement of *Clark's* claims under *Grayson's* patent. I think therefore that your Lordships will do rightly in affirming the judgment of the Lords Justices of Appeal, and dismissing the present appeal with costs.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 1st March, 1877.

Solicitor for the Appellant: *Alfred Hendriks.*
Solicitor for the Respondent: *J. Henry Johnson.*

[HOUSE OF LORDS.]

H. L. (Sc.) COWAN *et al.* . . . . APPELLANTS;

1876 THE DUKE OF BUCCLEUCH *et al.* . . . RESPONDENTS.

Nov. 30.

Habit of the House as to Scotch Practice.

In matters of practice where the Judges of the Court below have been unanimous, the House never varies their decision unless perfectly satisfied that it is founded on erroneous principles.

Nuisance—Joint Complaint and Joint Defence allowed.

Held by the House, affirming the decision of the Court below, that in a case of nuisance the several sufferers may combine and bring a joint action against the several authors of the nuisance;—asking a declarator and interdict but not claiming damages.

Per THE LORD CHANCELLOR (1):—There may be an inconvenience, amounting almost to an impossibility, in joining a number of Pursuers in an action for damages against a number of Defenders. But where the action is one, not of damages, but of declarator and interdict, the convenience and even justice of the case is best met by a joint proceeding.

Per LORD PENZANCE:—When the action is not one of damages but of declarator and interdict, the convenience and even justice of the case is best met by a joint proceeding. In this respect the Scotch practice differs widely from the English.

Per LORD O'HAGAN:—The convenience of having at once before the Court all persons affected by a process of this kind seems very manifest.

But in such a Case there must be Contingentia.

Per LORD BLACKBURN:—As to joining parties, the law of *Scotland* differs from the law of *England*; and if I were called upon to deliver an opinion I should be inclined to say that the Scotch law was better; but if two Pursuers or two Defenders are to be united in one action, they must have a *contingentia* connecting them with each other.

THIS case relates to an alleged pollution of the River *Esk* by the emanations of several great paper manufactories established along twelve miles of its banks in *Midlothian.* To repress this serious evil, the proceedings in the present suit were instituted by the Duke of *Buccleuch*, Lord *Melville*, and Sir *James Drummond*, as riparian owners, seeking a declarator and an interdict against the above Appellants, who have long been engaged in the important paper-making industry of *Scotland.* Three actions, commenced in 1841 (1), all having the same object, were conjoined by the Court. The defence of the paper-makers was, that the wrongs complained of were separate and individual, and ought to have been made the subject of separate actions and separate trials (2). This defence was repelled, and the case was referred to a jury, who returned a verdict for the Pursuers.

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(1) Lord *Cairns.*

On the 3rd of June, 1873, the Second Division of the Court of Session gave judgment as follows:

> The Pursuers have good and undoubted right to have the water of the *North Esk*, so far as it flows through or by their properties, transmitted in a state fit for the use and enjoyment of man and beast; and the Defenders have no right to pollute or adulterate the said water, nor to use it, or the channel of the stream, in any way, or for any purpose, so as to render it noxious or unwholesome, or unfit for all its natural primary purposes, to the Pursuers, or in any way to destroy the amenity of the said stream (3).

Upon further consideration the Second Division, on the 10th of June, 1873, issued the following interdict:

> Prohibit and interdict the Defenders from discharging into the water of the stream or river of *North Esk* from their respective paper-works any impure stuff, or water of any kind, whereby the said water, in its progress through or along the properties of the Pursuers or any of them, may be polluted or rendered unfit for domestic use, or for the use of cattle.

Against this decision the paper-makers appealed to the House of Lords, having for their Counsel,

Mr. *Thesiger*, Q.C., Mr. *Davey*, Q.C., and Mr. *Asher* (of the Scotch Bar), who contended that the Respondents' allegations ought to have been made the subject of separate actions by each Pursuer against each Defender to secure a fair consideration of each individual case.

Mr. *Southgate*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Robert Johnstone* (of the Scotch Bar), appeared for the Respondents, whose main argument was, that in accordance with the Scotch practice (differing from the English) parties may sue jointly and defend jointly where there is *contingentia ;* the Scotch law in such cases desiring to have both parties before the Court. The authorities chiefly relied upon in support of the judgment appealed against were Mr. *Ivory's* Forms, vol. i. p. 161, and the Practice of the Court of Session, vol. i. p. 204, by Sir *Charles Farquhar Shand* (1).

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(1) See Court of Session Cases, 3rd Series, vol. ii. p. 653; vol. iv. p. 475; vol. v. pp. 214 and 1054, and vol. xi. p. 675.

(2) The Defenders, the above Appellants, were seven paper-making companies, whose mills were on the banks of the river, some of them built above, and some below, the Respondents' respective properties; so that there could be no equality of contribution to the effluvium; and no one individual Defender could be held responsible for the others or any of them. Damages, however, were not claimed.

(3) Scotch Cases, 3rd Series, vol. xi. p. 680.

The following opinions were delivered by the Law Peers :—

The Lord Chancellor (2) :—

My Lords, the subject-matter brought under your Lordships' consideration in this case is one the importance of which to the Appellants can hardly be overstated. At the same time your Lordships have had the advantage of a most able argument which has submitted to you every topic which could be urged on behalf of the view taken by the Appellants. You have the unanimous decision of the Court of Session in *Scotland*, and I think I speak correctly when I say that the arguments of the Appellants have not raised in the minds of any of your Lordships any doubt as to the correctness of that decision. Under these circumstances, I think your Lordships are prepared, without further argument, to dispose of the question which is now raised.

The action is one instituted in *Scotland* with reference to an alleged pollution of the river called the *North Esk*. A number of riparian proprietors are proceeding against a certain number of owners of paper mills upon the *Esk*, and the summons alleges pollution of the river by those owners of paper mills. The points urged on the part of the Appellants resolve themselves really into one principal objection, and that is, that it was not competent, either in the shape of one original action, or in the shape of a conjunction of several actions, for different riparian owners to pursue the various owners of paper mills in one proceeding with regard to the pollution of the same river.

My Lords, this objection is, as your Lordships will at once see, an objection with reference to procedure and practice, and to a certain extent, with reference to the exercise of the discretion of the Court below. In matters of procedure and practice, and still more in matters of discretion, and above all where the Judges of the Court below are unanimous in their opinion, your Lordships' uniform practice has been not to differ from that opinion unless you are perfectly satisfied that it is founded upon erroneous principles.

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(1) Now Chief Justice of the *Mauritius*.

(2) Lord *Cairns*.

Now, my Lords, for the purpose of determining the competency of the action, we must look at the allegations which are found in the pleadings upon both sides; and I will, in the first place, direct your Lordships' attention to the particular relief which is asked in the original action.

I can very well understand that there may be an inconvenience, almost amounting to an impossibility, in joining a number of Pursuers in an action for damages against a number of Defenders. Suppose four riparian owners, *A.*, *B.*, *C.*, and *D.*, commence a proceeding against four owners of separate mills, *W.*, *X.*, *Y.*, and *Z.*, for the pollution of a river—a proceeding in which the Pursuers seek to recover damages against the Defenders—there the jury or the tribunal, whatever it might be, which would have to inquire into and assess the damages, would have first to take the case of the millowner *W.*, and having ascertained that he was liable to damages, they would have to find out what damages he had to pay, first, to the riparian owner *A.*, then to the riparian owner *B.*, then to *C.*, and then to *D.* The amount of damage might be, and in ninety-nine cases out of one hundred would be, different as to each; and a different inquiry, and an assessment of a different sum, would have to take place as to each of them. So, my Lords, it may be with regard to the Defenders; when you had ascertained the sum which would have to be paid by *W.*, by way of damages, to each of the four riparian owners, you would then have to proceed to the case of *X.* It is almost impossible that the damage occasioned by *W.* should be exactly the same as the damage occasioned by *X.* You would have, therefore, in the case of *X.*, of *Y.*, and of *Z.*, to ascertain as to each of them the damage which he had done, and again the damage which he had done to each riparian owner. The inconvenience of a proceeding of that kind is so great, that although it is not a point for your Lordships' decision in the present case, and

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I do not desire to be taken as expressing any final opinion upon it, I can well understand that by reason of that inconvenience it might well be held that it was incompetent to join together the Pursuers whom I have described, and the Defenders whom I have indicated, in one and the same proceeding.

But, my Lords, when I turn to the nature of the present proceeding, I find that it is as different as anything well can be from a proceeding sounding in damages. Your Lordships find that there are three different subjects to which the conclusion of the summons points. I refer to the summons in the original action, which in this respect is the same as the summons in the later actions. The first object is that

> It should be found and declared that the Pursuers have good and undoubted right to have the water of the *North Esk* so far as it flows through or by their properties transmitted in a state fit for the use and enjoyment of man and beast; and that the said Defenders have no right to pollute or adulterate the water, nor to use it or the channel of the stream in any way or for any purpose such as to render the water noxious or unwholesome or unfit for all its natural primary purposes to the Pursuers, or in any way to destroy the amenity of the stream.

That is to say, that there may be a declaration that the natural right to the running stream in its natural condition, which *primâ facie* would be possessed by these riparian owners, has not been in this particular instance taken away, or abridged, or in any way affected by any right acquired by those who are said to be polluting the river.

The second object of the action is that the Defenders may be

> Prohibited and interdicted from discharging into the water of the *Esk* from their respective paper works any impure stuff or matter of any kind, whereby the water in its progress through or along the property of the Pursuers, or any of them, may be polluted or rendered unfit for domestic use, or for the use of cattle, or its amenity in any way diminished, or the rights of the Pursuers therein in any way injured or affected.

That is to say, an interdict following the declarator and protecting the right which, in the first instance, is sought to be declared; and then in the alternative,

> It ought to be declared that in the event of the Defenders, or any of them, being found entitled to continue the use of the water, or any portion thereof, for all or any of the works above mentioned, that they are bound and obliged to make use of the water in the manner least injurious to the Pursuers, and to use

all necessary and proper precautions, by filtration and otherwise, to restore the water to the stream after having been used at the works respectively, in as pure a state and condition as possible.

Along with that conclusion of the summons, your Lordships will probably take those averments in the condescendence and in the replies to which, in the course of the argument, your attention was directed. Those are averments asserting, upon the part of the Pursuers, a course of pollution of the river uniform, in this respect, that it comes from the different paper mills used by the different Defenders in the manufacture of paper of the same or of a similar kind; and the Defenders make defences to these averments which are identical in point of allegation and in point of expression.

Now, my Lords, I do not mean to say that even in this case (I am still considering the *à priori* arguments for or against the united action) there may not be inconveniences in having to try the action which it is proposed to try by the summons to which I have referred. The nature of the case is such that, tried in any way, either in a joint action or in a separate action, great and grave inconvenience and difficulty will be experienced by any Court upon which the task of trial devolves. But, my Lords, I have no hesitation in saying that, as a balance of convenience and inconvenience, it appears to me that, looking at the subjects of relief which are comprised in this summons, the convenience of dealing with these matters of relief in one conjoint action rather than in separate actions, preponderates immensely in favour of conjunction. Take, for example, the intermediate conclusion of the summons with regard to an interdict; supposing an interdict had been granted in five or six different actions, and it became a question as to whether that interdict had or had not been obeyed, it would be utterly impossible for any Court to answer that question without having before it the whole of the Defenders, in order that the Court might know to the conduct of which of the Defenders the continued pollution of the river was to be attributed. And so, also, with regard to the question of the pollution before the interdict was granted. The experience of any of your Lordships who have observed trials of this kind will have shewn you that where the proceeding is directed against one individual simply for polluting a river, it is always a topic of defence with that one individual, that the pollution either comes altogether from the works of some other person upon the river, or comes from the works of that other person in so great a degree as to render the pollution of the individual actually sued not worthy the attention of the Court. It is, therefore, only where you can have placed face to face before you the various persons who are said to be polluting the same stream by the same process and by similar acts that you can decide whether they are all culpable or not, and whether there shall be a declaration with regard to all of them or not; and, if anything is to be done which bears the aspect of an intermediate course—anything in the way of remedy—how that shall be carried out as between the different persons before the Court.

Those, my Lords, are the considerations which, altogether irrespective of authority, naturally occur to my mind, and which I submit for the approval of your Lordships. We must, however, be regulated by the well-established rules of procedure and practice, if there are established rules of procedure and practice, upon the subject; and, however convenient the course which I have indicated may be, if there are rules of procedure against it, those rules must not be departed from.

But, my Lords, are there such rules of procedure and practice in *Scotland* as render an action such as I have described incompetent?

The procedure of the Courts, both of Equity and of Common Law in *England*, has been very well known, and in the Common Law Courts of this country has long been of a very rigid and exact description. That is a procedure generally between one person and another person, between *A.* and *B.*, the one almost always suing the other for damages. A single issue is raised and is adjusted between the two litigants, and the right of the Plaintiff is established or is denied against the particular Defendant. So rigid and so inconvenient at times was the course of procedure at Common Law found to be, that in the Court of Chancery it has been very much relaxed, and much greater latitude has been allowed there in the joinder of different parties having an interest in the same subject-matter. Your Lordships were referred, in the course of the very able argument by Mr. *Davey*, to a well-known proceeding in the Court of Chancery called a bill of peace; a bill not of very common occurrence, but of which there have been instances even within living memory; a bill which brings before the Court a number of persons having, not identical rights, but, rights in regard to the same subject-matter, who are making claims and asserting those rights, and who are brought together to have something like a declarator made in the presence of the whole, with regard to the nature and extent of those rights, in order in that way to give quiet and peaceful possession to the Plaintiff who brings them before the Court. In one point of view the present proceeding, if we put aside the more active part of the relief sought, namely the interdict, bears a certain analogy to a bill for quiet possession. The tendency in this country, as has been pointed out, with reference to recent legislation, has been very much to enlarge the power of bringing parties having several interests, or interests in the alternative, before the Court.

But, my Lords, passing from the English practice, which can only be referred to as an illustration, and coming to the Scotch practice, what do your Lordships find to be the state of the authorities? The competency of joining in an action of this kind several Pursuers, appears to me to be put beyond all doubt by the authorities which have been referred to. Your Lordships have the case of the *River Don* (1), where the upper heritors appear to have maintained an action for the purpose of having removed a fence or weir, or impediment of some kind, which was placed across the river lower down, and which interfered with the passage of salmon up to the various lands of the upper heritors. There is also the case of Lord *Moray* (2), where one general act done by the orders of Lord *Moray*, affecting a number of persons each in his own premises, was made the subject of proceedings, which were maintained successfully by several Pursuers of the same character as the Pursuers in the present case. And, my Lords, there is no authority produced the other way. As to the question of Pursuers joining, therefore, the authorities appear to me to be quite clear and quite satisfactory; and indeed the argument was not directed at all so strongly against the junction of the Pursuers as against the junction of the Defenders.

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(1) *Lord Forbes* v. *Lees*, 2 Sh. 603.
(2) *Downie* v. *Earl of Moray*, 4 Sh. 912.

How, my Lords, do the authorities stand with regard to a joinder of Defenders? In the first place I must point out a matter of the greatest possible weight, namely, that there is no authority produced in any decided case, or in any book of practice, which negatives the right and competency, in a case of this kind, of bringing before the Court several Defenders. And your Lordships have the unanimous opinion of the Judges of the Court in the present case, that such a proceeding is competent and is not at variance with the known and recognised procedure. Your Lordships happen to have a case recorded in which although it is perfectly true that no objection such as is taken here was taken, yet a similar objection might have been taken; and from the fact that the objection was not taken, I infer that the joinder in that particular instance of various Defendants was assumed by every person to be consistent with the ordinary procedure in *Scotland*. I refer to *Lord Breadalbane's Case* (1), the case of the sheep-drovers, which came before your Lordships' House. There Lord *Breadalbane* brought before the Court several persons who were united in interest only in this way, that they all alleged that they had a right in driving sheep from farms in the North of *Scotland* towards the south, not only to use a roadway, the right to use which indeed was not in any way denied, but that they were entitled every ten or twenty miles to halt the droves of sheep, and to pasture them in the neighbouring land of Lord *Breadalbane*, on what were called the stances, which really were parts of the hill side. Lord *Breadalbane* united together as Defenders seventeen, eighteen, or twenty of those persons who asserted a right of that kind; he brought them before the Court for the purpose of obtaining a declarator and an interdict; he succeeded in doing so; and the objection was never taken that it was wrong or contrary to Scotch procedure to join those various Defenders together.

There is, moreover, an Act of Parliament applying to *Scotland*, 48 Geo. 3, c. 151, which provides:

> That where any action, matter, process, complaint, or cause, has been brought

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(1) 9 Dun. 210, and Bell's App. Cases, 43.

before one of the said Divisions of the Court of Session, or the Lords Ordinary thereof, the other Division or the Lords Ordinary thereof shall remit any action, process, matter, complaint, or cause, subsequently brought before them relating to the same subject-matter or thing, or having a connection or contingency therewith, to the consideration of the Division or Lords Ordinary before whom the first cause, action, process, complaint, or matter, had been previously brought; which remit shall be made in such form and manner as is now used, or as shall be established by future regulations from time to time.

Therefore, my Lords, if there had in this case been separate actions brought by these Pursuers against the different owners of these mills, it would have been obligatory upon the Division of the Court before which they were brought to send the second and the subsequent of those actions to the Lord Ordinary who had seisin or possession of the first; and they must all have stood before that same Judge, and it would have been for that one Judge to consider what, under those circumstances, he ought to do. I took the liberty of asking the learned counsel whether he could shew that it would have been *ultra vires* of that Lord Ordinary to join those actions, if he had thought that they were so connected in point of evidence and in point of interest that it would be more convenient that they should be tried on one occasion before one jury than that they should be tried on different occasions before different juries. The learned counsel doubted the power of the Lord Ordinary, but no authority was adduced to shew that the Lord Ordinary had not such a power.

The Act of Parliament evidently indicates that the remit is to be made for some practical purpose. There can be no practical purpose, as, indeed, was pointed out by the Lord Justice Clerk, except that the Lord Ordinary, when he has the different actions before him, may consider what is the best course to adopt, whether to join them together, or to sist all but one to wait until that one is tried; that is to say, it is in the discretion of the Lord Ordinary which course he will pursue. But if it is in the discretion of the Lord Ordinary to join together a number of actions brought by these Pursuers against each polluter of the river, I ask why is it to be held to be contrary to procedure, or contrary to competency, that in the first instance the Pursuers should join the various persons said to be polluting in the same way the same river, in one and the same action? It appears to me that there is nothing in reason or in principle which can lead your Lordship to hold that the learned Judges of the Court of Session were wrong, when they affirmed that such an action was competent in *Scotland*. It appears to me, therefore, to be perfectly clear that the action is competent as regards the joinder of the Pursuers. And although the authority is not so distinct for the joinder of the different Defenders, there is authority for their joinder; there is the united testimony of the Judges in the present case that such joinder is consistent with the Scottish procedure—there is every argument of convenience for having this whole question decided in one litigation between the different parties; and therefore the objection as to competency must, in my opinion, fail.

Some argument was adduced with regard to the form of the issues, but that came I think in the result not to be really insisted upon before your Lordships. Whether, if your Lordships had now the settling of the issues, some words might or might not with advantage be altered, I do not stop to inquire. It appears to me that in substance these different issues presented to the jury the various questions which had to be decided, and there is nothing before your Lordships to lead you to suppose that there has been any miscarriage of justice in the determination which has been elicited from the jury.

My Lords, upon the whole, I submit to your Lordships, that this appeal fails, and that it must be dismissed with costs.

LORD PENZANCE:—

My Lords, this case has been so completely gone into by the Lord Chancellor, and I so entirely agree with everything that has fallen from him, that very little on my part needs to be added.

A great deal has been said in argument about the convenience or the inconvenience of adopting this or that course; but, after all, I apprehend that the question before your Lordships to-day is, not whether it is most convenient that this or that procedure should be adopted, but whether, as a matter of fact, the procedure in the present case is or is not consistent with the existing practice of the Court in *Scotland*.

When we come to examine that question, I admit that we are met with some difficulty by reason of the very meagre materials that are afforded us upon which to form a conclusion as to what the practice of the Court in *Scotland* is. But, my Lords, I conceive that where the Court has, by a unanimous decision, affirmed that this proceeding is entirely within the limits of its own practice and procedure, something very much stronger than any argument as to such a procedure being inconvenient ought to be required before your Lordships can come to a conclusion that a decision affirming that procedure ought to be reversed. And, indeed, I think that, under the circumstances, the Scotch Court having affirmed the existence of the procedure, the *onus* is cast upon the Appellants to satisfy your Lordships that that conclusion is wrong by referring you to some distinct precedent, decision, or authority to the contrary effect.

The Appellants have wholly failed to lay before your Lordships' House anything in the shape of a decision contrary to the decision which is now appealed from; but they have adduced a great deal in the way of argument tending to shew that such a practice might be inconvenient. And here, my Lords, I will observe that there is a constant tendency in the argument of a case of this kind to draw analogies from the law of *England*, and I think your Lordships cannot be too much upon your guard against importing into a question which is purely Scotch, relating to the practice of the Scotch Courts, conclusions drawn from a practice purely English, namely, the procedure of the Courts of this country. As the Lord Chancellor has said, there is no doubt whatever that as far as Common Law is concerned, the Courts in this country have been bound, most of them, by inflexible rules handed down in great measure from the time of the *Plantagenets*, and until certain modern statutes were passed there was no possibility of altering or improving them.

But, my Lords, when I inquire in this case as to the Scotch practice, I am struck at once by the great dissimilarity that there is between the practice in *Scotland* and the practice of the Courts in this country, because, to take for instance one of the cases which have been cited, the case of *Revie and Bell* v. *Murdoch* (1), which was the case where two men were thrown out of a gig by reason of somebody's negligence in leaving a heap of rubbish out in the road, it was held in the Court in *Scotland* that those two men could join together in an action. That, I need hardly say, is a matter which is entirely inconsistent with any practice in this country. They were independent persons, each having independent causes of action, each having received independent injuries, and each was entitled to a personal action. No doubt the cause of action would be similar in each case, but there was no community between the two Plaintiffs, which, according to English practice, would admit of their being joined in one action. The next case cited was the case of *Harkes* v. *Mowatt* (1), in which the action was one of slander by two Pursuers against one Defender, who had said that they were robbing, swindling rascals. It was quite consistent with the practice of the Scotch Court that that should be a joint action; but that, again, is wholly at variance with English notions upon the subject.

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(1) 3 Dun. 888.

My Lords, I think an even stronger illustration is found in the case of *Douglass* (2), which has been alluded to in the argument. We have the judgment of the Lord Justice Clerk in that case, and your Lordships find that he said, after alluding to an Act of Regulations which was passed in 1695:

> It is not pretended that this regulation can receive, or ever has received, literal obedience. On the contrary, the object of the provision, much more limited than the words seem to import, is well known historically to have been the prevention of a practice, formerly prevalent, of embracing in one summons actions against debtors more than six in number, each Defender being pursued on a separate ground of debt, unconnected with the debts of the other Defenders called. Strange as this may sound to modern ears, there is no doubt of the fact, for it is distinctly stated by Sir *George Mackenzie* (3), writing before the Act of Regulations, in the year 1684. He says: "Though the accumulations of several actions into one libel was not allowed by the civil law, yet it is allowed by ours, in which we may not only pursue several persons for several debts in one libel, which we call by a general name, an *action against debitors*, but we may likewise accumulate several conclusions against one and the same person, though they be of different natures, as reductions, improbations, and declarations of property, and actions of general and special declarator, in all which it is a general rule, *quot articuli tot libelli.*"

That, my Lords, is a general statement of what the old law of *Scotland* was, and it is utterly at variance with the English practice. Although it is quite true that this practice with regard to debts, as the learned Judge goes on to point out, has long since been disused, and has not for the last 100 or 200 years been followed, still here is a statement which shews that the old law of *Scotland* was in this respect of joining both Plaintiffs and Defenders together so widely at variance with the English law that we need not be astonished to find that in such a case as the present, although this joining of Plaintiffs and Defenders is a thing which according to the English law we could not support, yet, according to the Scotch law, it might be the most natural thing in the world.

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(1) Scotch Cases, 2nd Series, vol. xxiv. p. 701.

(2) 22 Dun. 447.

(3) Mackenzie's Inst. book iv. tit. i.

Now my Lords, there being no authority whatever against this conjoint proceeding, there being the statement of the Court itself that it is according to practice, and there being from the authorities I have just alluded to proof that the procedure in *Scotland* widely differs from the procedure in *England* in this respect, I think there can be no more natural conclusion to arrive at than that this conjoint proceeding is quite consistent with the practice of the Court in *Scotland;* and I venture to say that that is really the whole question before your Lordships upon the present occasion.

But as a very able argument has been addressed to us with regard to the convenience and inconvenience of the matter, and as distinctions have been taken by the learned counsel, according to which, supposing that those distinctions are correct, although the Defenders might in some cases be joined, they could not be joined in such a case as this, I will trouble your Lordships with one or two remarks, and one or two only, upon the subject. It has been argued that the cause of action in such a case as the present against each Defender is wholly separate and distinct and unconnected with that against the others, and it is upon this proposition that the chief reliance is placed against the competency of the action. But the cause of action in each case is not the mere act of pouring polluting matter into the river, for the quantity might be insufficient to do mischief, by reason of dilution, or the water might purify itself as flowing water does; so that the cause of action is not complete until the result of rendering the water unfit for the Pursuer's use has been brought about. This result may in some cases perhaps be traced to the individual act of one of the Defenders; but in the majority of cases the reverse is the case, and the extent of deterioration in the water worked by the polluting acts of several other Defenders would have to be inquired into. This establishes, I think, a very obvious connection between the several Defenders. The cause of action against each of them depends upon the ultimate impurity of the water when it reaches the Pursuer's lands, and that ultimate impurity is the joint result of the acts of all of them. The main ground therefore upon which the incompetency of the present action is rested appears to me to fail.

But if I turn to the question of convenience I think the case is even stronger for the Respondents, for the choice as a matter of convenience lies between investigating this joint result and determining the share which each Defender may have had in it in the presence of all the Defenders on the one hand, or trying the effect of each Defender's acts separately and in the absence of the others on the other hand. Even in the case of damages there would be much to be said under such circumstances in favour of a joint trial; but in such a case as the present, which is one not of damages but of declarator and interdict, the convenience and even justice of the case is in my opinion best met by a joint proceeding.

I am well aware, on the other hand, of the inconveniences to which the learned counsel adverted. There is no doubt that there are never three prisoners tried, and there are never cases in which there are three Defendants in a Common Law action whose defences are separate, and there are never cases in which there are three or four parties in the Divorce Court or in the Probate Court coming before a jury, where grave inconveniences may not arise by reason of the several parties having separate interests, so that the defence of one party is not identical with that of the others; and still more by reason of what is evidence against one party not being evidence against another. The strongest possible evidence against a man is a letter or paper written by the man himself, but such a letter, which is evidence only against the man who wrote it, may prejudice the jury against the other Defendants who never wrote the letter and had no concern in it. Notwithstanding this inconvenience, which arises where there are several parties joined together, I think the balance of convenience on the whole is in favour of a joint proceeding as against a separate proceeding in such a case as the present. But again I say I invite your Lordships to decide this question, not upon the question of convenience, but upon the only question which according to my mind arises in the case, Aye or no, is this in accordance with the practice of the Scotch Court? And as we have a unanimous statement of the Scotch Court upon that point, I would advise your Lordships to affirm that decision unless you are satisfied that there has been some authority or proof adduced by the Appellants that that decision is erroneous.

LORD O'HAGAN:—

My Lords, I have given careful attention to the very able arguments addressed to us, but they have failed to satisfy me that your Lordships would be well advised in disturbing the unanimous decision of the Scotish Judges.

The question is one of local procedure and practice, and most fit to be dealt with by the local tribunals. Many subjects of controversy have been discussed, but they have really resolved themselves into a single one—the competency of the several actions. We have been relieved, by the candid statement of the learned counsel, from the consideration of the sufficiency of the issues, and the suggestion of "acquiescence:" and the objection as to "conjunction," has been urged only as affecting the argument on "competency." Indeed, it could not have been otherwise judiciously pressed; for the right of the Court to conjoin actions, in proper circumstances, has been established by ample authority, and its exercise being plainly within the discretion of the Judges, your Lordships would scarcely have departed from the ground of your ruling in *Wanchope* v. *The North British Railway Company* (1), or interfered in any way with the decision they have pronounced. The reasoning of counsel on the point of "conjunction" does not appear to me to have aided them in their denial of "competency," and as to this your Lordships would be slow, without coercive reason, to differ from the Judges in ascertaining the existence and effect of rules of procedure established by no written law, but originating in views of social convenience and the interests of suitors, with which their judicial experience must have made them especially conversant. I think, however, that, on authority and principle, the ruling of the Courts below was perfectly right.

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(1) 4 Macq. 248.

Our duty is to discover, as well as we can, what has been the practice in *Scotland*, with reference to the joinder of parties, and we have been assisted, for this purpose, by many authorities, to which I shall not, after the ample analysis they have undergone, particularly refer. The result of them, to my mind, very clearly is, that, at least as to Pursuers, what was done in this case was fully warranted. Indeed, it was not ultimately denied by the learned counsel, that when a single act, which affects several persons, is the subject of complaint, they may together sue the doer of it. In my opinion, this admission decides the case against the Appellants. There is here, in reality, only one matter of complaint, the pollution of the river. One remedy is obtained, the issue of an interdict. To the single result which injures the Pursuers, the Defenders are contributories in different degrees. But the aim of the proceeding is not to affect each of them apart from the others, but to prevent the one consequence of their combined action. Damages are not sought against them individually. The effort is, to abate the mischief they all have wrongfully wrought. Thus regarded, on a consideration of the cases, and on the interpretation to be fairly given to them, the junction of the Pursuers appears to me unimpeachable. They have a common interest in the stream, in its purity and its amenity. They suffer from a common grievance in its pollution. That grievance is created by the action of men engaged in the same trade, using the same machinery and materials which conduce to the same injurious consequence, and this the Pursuers seek to obviate by a single judicial act equally restraining all who have produced it.

We have had many inapt illustrations and delusive analogies in the course of the argument, and I have been quite unable to appreciate the force of the distinction taken to-day between the case of persons sending pollution through the same pipe and of others sending it in a different way, but by their common action and with the same result, into the same river. If there may be, as was conceded, joinder of Pursuers and Defenders, in the one case, I cannot imagine why they should not be joined in the other.

Then, as to the junction of Defenders, much the same course of reasoning appears to me to apply. For this there is not, undoubtedly, the same clear authority as warrants the junction of Pursuers; but in the *Breadalbane Case* (1) and *Lord Forbes' Case* (2), we find Defenders joined without objection, and there may have been many such cases of which we have no account. The very generality of a practice may prevent the record of its particular application. And, in such a state of things, it is not too much to say, that the judicial affirmation of its existence and its nature is entitled to the highest consideration.

I do not trouble your Lordships with observations on the expediency of the course of which the Appellants complain. It has already been demonstrated by my noble and learned friends. The convenience of having all persons affected by a process of this kind at once before the Court seems very manifest; and the extreme difficulty of working out such a process, in the absence of the majority of them, with justice to all, is equally so. The case might wear a different aspect if the Pursuers sought damages instead of seeking declarator or interdict.

The argument *ab inconvenienti*, so strongly urged for the Appellant, appears to me, as to my noble and learned friend on the woolsack, to tell the other way. No doubt if parties are numerous and issues complicated, Judges may find their duty onerous, and juries may run the risk of applying, for or against one party, the evidence properly applicable to another. But these are inevitable incidents, affecting every day the most serious criminal and civil trials; and the evil must be mitigated, as best it may, by the guidance of the Judges and the intelligence of the jury. On the other hand, it is surely for the advantage of the satisfactory administration of justice, that those who complain of a common injury, and those who are charged with the commission of it, should all be enabled to assert themselves before the same tribual, especially when that tribunal has ample power to prevent any individual wrong, by the shaping of separate issues, and the regulation of the course and conduct of the trial.

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(1) 9 Dun. 210, and 7 Bell's App. Cases, 43.

(2) 2 Sh. 603.

On the whole, I have no doubt that the appeal should be dismissed.

LORD BLACKBURN:—

My Lords, I am also of opinion that the appeal should be dismissed. I apprehend that the important question is, what is the Scotch law and practice as to joining parties, either Pursuers or Defenders; and, as to that, I think this much has been shewn clearly enough in the course of the argument, that the law of *Scotland* with reference to that matter is different from the law and practice of *England*. If I were called upon to deliver an opinion upon it, I should be inclined to say that the Scotch law was better. Certainly it is not at all inconsistent with natural justice. But, at all events, it is different; and it is by the Scotch law and practice, and not by the English, that this matter has to be decided.

Now I find that the Lord Justice Clerk, in delivering judgment upon the point of conjoining the three actions, states, and no doubt perfectly accurately, that from the earliest times in *Scotland* it has always been the course, as much as possible, to bring all actions that have any *contingentia* with one another together, and let them be tried together, and disposed of together. The consequence of such a conjunction must frequently be to unite Pursuers or to unite Defenders who according to the English practice would not be united as Plaintiffs, and would not be united as Defendants.

Then, my Lords, comes the question whether in this particular case it is competent, according to the Scotch law, to join together in one suit these different Pursuers, they being several different heritors who have properties on different parts of the River *Esk*, and claiming a declaration that the river is to be kept clear of pollution, and asking for an interdict to be granted against the Defenders, several paper manufacturers in different parts of the River *Esk*, who do separately (for I quite agree that there is not the slightest evidence of their acting in concert) pour polluting materials into the river, so that the Pursuers are, as they allege, injured by their acts in the process of that manufacture. Now as to the joining of the different Pursuers together, I agree with what has been said by my noble and learned friend the Lord Chancellor, that the authority is very strong indeed, that where you have different Pursuers with one interest as against one Defender, those several Pursuers may unite their cases.

Authorities have been produced of instances where several Defenders were sued together. But those cases are not nearly so strong or so numerous as the cases of conjoint Pursuers, and if I had been called upon, before this case was decided, to say whether such a rule of practice of Scotch law was made out, I should have felt considerable hesitation about it. But when I look at the decision which was come to unanimously by the Court below in this case, it is so perfectly consistent in my mind with justice that I have no hesitation in saying that I should act upon it.

I only wish, my Lords, clearly to guard myself against being supposed to say that I think that according to the Scotch law it can at all be said that *any* Pursuers may join together. Still less can it be said that a Pursuer may join *any* Defenders together. I think what is laid down by the Court below furnishes a very good rule, at least as far as this case is concerned; it is necessary that the cause of action about which the Pursuers complain should be to some extent a united one; it is necessary that there should be some *contingentia*. I will not now inquire how much *contingentia* there must be, but some there must be. In like manner with Defenders it must be shewn that there is some *contingentia* in their acts. I think when you come to look at it you get the answer to the question, What is the test, as far as this matter goes, very well indeed from the Lord Justice Clerk, who said:

> The object of this action is to protect the River *Esk* from pollution by the operations of the paper-makers upon the river. It appears to me that that simple statement of fact, and of the object of the action, at once suggests the extreme propriety and expediency of the proprietors who are injured being all here on the one hand, and the paper-makers who are said to inflict injury being all here on the other hand. No doubt, if there were any rule in our practice which rendered it incompetent for parties having all a common interest in a stream to pursue an action against parties who all contribute exactly in the same way to the pollution of the stream, we must give effect to that rule of practice. But I know of no such rule.

I may observe that some part of the argument at your Lordships' Bar depended upon the use of the word "exactly" in that sentence. The different paper-makers upon different parts of the River *Esk* who put refuse into it at places which are miles distant from one another, may not, in one sense of the word, be said to be doing "exactly" the same thing; but in the ordinary use of the word it has that effect given to it, and that is the sense in which the Lord Justice Clerk uses the term. He then proceeds to say:

> Therefore I am bound to look upon this as a question depending upon general principles. I think the case will be most fully and fairly tried by having all the parties called who are interested on the one side or on the other.

Now, my Lords, I think, confining that test to the cases to which it properly applies, it enables us to say that the process of the Scotch Court is perfectly just, that if two Pursuers or two Defenders are to be united in one action they must have a *contingentia* uniting the two, connecting them with each other; and it must go so far as to shew that the whole case will be most fairly and properly tried and justice will be best done; indeed that it cannot well be done otherwise, by all the parties being brought into the action. Applying that principle to the present case, I do not think any one can dispute that the real question raised in it was whether or no the proprietors of land along the bank of the *Esk* had a right to prevent the paper-makers from polluting the river, each paper-maker doing it separately at his own mill, but the general effect being to produce one nuisance to the heritors. I think no one can doubt, looking at the nature of the proceeding, that it was one in which justice as well as convenience made it in every way desirable that all the parties interested should be brought before the Court together, and their cases tried in one action. I do not think it necessary to inquire whether there are other cases in which it might be done, but it seems to me that here it was rightly done; and if it is once established that here it was competent to bring the first action, so it seems to me self-evident that the Court were quite right in conjoining the other actions with it. I do not think it necessary to say anything upon any other point.

LORD GORDON:—

My Lords, in this case I happened to be counsel for the parties, first, for one set of parties, the Appellants, and afterwards for the Respondents. I do not know, therefore, that it would be expedient that I should take part in the expression of opinion in this case further than by saying that I concur in the views which have been expressed by your Lordships with regard to the import of the opinions of the Judges of the Court below as to the procedure and practice which ought to regulate these matters. The question is one which depends peculiarly upon Scotch procedure, and is a matter regulated by practice; and the result of the opinions expressed by your Lordships is clearly in accordance with the views which have been expressed by the Judges in the Court below, who were unanimous upon the point. No difference of opinion existed either on the part of the Lord Ordinary or on the part of the Judges of the Inner House: and it certainly must be very gratifying to us in *Scotland* to find that your Lordships are of opinion that there are great conveniences in following the procedure and practice of *Scotland* in such a case as the present.

I shall only observe that I do not find it alleged that any injustice has resulted from the combination of the parties at the trial. On the contrary, I find that the Appellants had recourse to two proceedings which were open to them for impugning the verdict if they thought proper. The first was an exception to the law as laid down; that however was not insisted upon; they apparently departed from their right to proceed in that way; and it is not now before your Lordships. The other proceeding was an application for a new trial upon the ground of the verdict being contrary to the evidence. But with respect to that it appears that the application was discharged with the consent of the Appellants themselves. I do not find therefore upon the papers before the House a suggestion that any injustice resulted from the adoption of the course which the Court below had followed in accordance with the practice which regulates them in these matters. I beg to express my concurrence in your Lordships' judgment.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agents for the Appellants: *Simson, Wakeford, & Simson.*
Agents for the Respondents: *J. & J. Graham.*

[PRIVY COUNCIL.]

J. C.*

1877

Feb. 6, 7, 8; March 10.

WILLIAM IRVINE . . . . DEFENDANT;

AND

THE UNION BANK OF AUSTRALIA . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Powers of Directors to borrow and mortgage—Ratification by Company of particular act of Directors done in Excess of Authority—Such Ratification not an Extension of future Authority.

4 App Ca 158
17 Ch D 717

By Art. 50 of the articles of association of the *O. R. Company* (which was limited by guarantee, and registered in *Victoria* under a local Act corresponding with the English *Companies Act*, 1862), it was provided that the directors' power of borrowing sums on the credit of the company "should not exceed in the aggregate as an existing debt at the same time one-half of the then actually paid-up capital." The articles contained no restriction upon the company's power of borrowing; and the directors' power to borrow was capable of being extended under Art. 31, by one-half of the votes of all the shareholders given at a general meeting.

On the 23rd of December, 1867, the directors obtained a letter of credit, No. 150, for £10,000, and on the 11th of September, 1868, a letter, No. 141, for £5000, and stated to that effect in their report of the 29th of October, 1868, which was ratified at the half-yearly meeting of that date. Letter No. 150 expired on the 29th of March, 1869, but was renewed. On the 9th of September, 1869, the directors obtained another letter of credit, No. 153, for £5000, but this act was never assented to or ratified by the shareholders.

In a suit by the Respondent bank to enforce against the Appellant, as the assignee of the right, title, and interest of the *O. R. Company*, an equitable mortgage which had been granted by the company to secure advances made by the bank, which, with interest, amounted to £15,296, it appeared that half of the actually paid-up capital was never more than £8550; that at the end of 1870 the balance due to the bank was £8; and that the sums claimed in this suit had been advanced in February, 1871, viz., £10,000 under letter No. 150, and £5000 under letter No. 153:—

Held, that the limitation of the power of borrowing and mortgaging contained in Art. 50 was merely a limitation of the authority of the directors conferred by the same article; that it was not a limitation of the general powers of the company, and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding.

The ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain letter of credit No. 153, in September, 1869, or to borrow £5000 thereon in February, 1871.

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* *Present:*—LORD BLACKBURN, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The ratification of letter of credit, No. 150, for £10,000, did not authorize the renewal of it, or the acting upon it after the time originally limited had expired.

Although it might be competent for a majority of shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; yet if the object was to give the directors in future an extended authority beyond what is given by Art. 50, that could only be effected by a vote of one-half of all the shareholders of the company.

The ratification at a half-yearly meeting of a particular act of the directors in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.

Royal British Bank v. *Turquand* (1) distinguished.

THIS was an appeal from a decree of the Court of the Recorder of *Rangoon* (Oct. 8, 1875), declaring in effect that certain property situate at *Poozoondoung, Rangoon*, and consisting of two plots of ground with a rice mill and other buildings thereon, was charged with the sum of £14,984. 16*s.* 6*d.* in favour of the *Union Bank of Australia*, and directing a sale in default of payment of that sum and interest.

The property in question lately belonged to the *Oriental Rice Company, Limited.* On the 31st of May, 1872, the Appellant *William Irvine* purchased the right, title, and interest of the *Oriental Rice Company* at a sale by auction in execution of three decrees obtained by the *Bank of Bengal* and two other creditors against the company in the Court of the Recorder of *Rangoon.*

At the date of the auction sale, the title deeds of the property were held by the *Union Bank of Australia* as equitable mortgagees by deposit.

The question raised by this appeal was, What is the sum for which the *Union Bank* is entitled to a charge upon the property? On the part of the bank it was contended that it was entitled to a charge for the whole amount owing to it by the *Oriental Rice Company.* On the part of the Appellant it was contended that the charge was limited to the amount of one-half of the actually paid-up capital of the company.

The *Oriental Rice Company, Limited*, was incorporated under the statutes in force in the colony of *Victoria*, by deed of settle-

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(1) 5 El. & Bl. 248; 6 El. & Bl. 327. 1 Jur N.S. 1086
2 L 663.

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ment dated the 25th of April, 1861, and on the 18th of August, 1864, it was duly registered as a company, limited by guarantee under an Act of the Legislature of *Victoria*, known as the *Companies Statute*, 1864, which followed and adopted the provisions of the *Companies Act*, 1862.

The articles of association material to the issues raised in this appeal and the facts of the case are sufficiently set forth in the judgment of their Lordships.

On the 8th of January, 1873, the Respondent bank filed its plaint in the Court of the Recorder of *Rangoon* against the *Oriental Rice Company, Limited* and the Appellant, praying, first, that the Defendants might be ordered to pay to the bank, within a short day, the sum of £15,296. 17*s.* 6*d.*, or such other sum as the Court should find to be due; secondly, a declaration that the bank was entitled to an equitable mortgage upon the premises for securing the repayment of £15,296. 17*s.* 6*d.*; thirdly, foreclosure on non-payment; fourthly, or sale; fifthly, for costs and general relief.

On the 3rd of February, 1873, the Appellant filed his written statement, relying among other things on the provisions of the articles of association, which limited the borrowing powers of the directors.

On the 10th of February, 1873, issues were settled by the Recorder of *Rangoon*, including an issue whether the bank had any lien on the land mentioned in the plaint for any, and, if any, what sum.

The *Oriental Rice Company* did not enter an appearance in the suit.

On the 8th of October, 1875, the Recorder (*C. J. Wilkinson*, Esq.) pronounced judgment, and made the following decree:—

"It is ordered and declared that the Plaintiffs have an equitable mortgage on the property mentioned in the plaint, and it is ordered that the first Defendants do pay within six months from this date to the Plaintiffs the sum of £14,984. 16*s.* 6*d.*, with interest thereon at 8 per cent. per annum from 5th October, 1872, to the date of decree, 8th October, 1875, equivalent to Rs.1.97,755. 2*a.* 0*p.*, @ 1*s.* 10$\frac{9}{16}$*d.*, the current rate of exchange at the time of the filing of the suit, and the interest thereon at

6 per cent. per annum, from the date of decree to date of realization; and in default of the said first Defendants paying to the Plaintiffs such principal and interest as aforesaid within the time aforesaid, then it is ordered that the said mortgaged premises be sold. And it is further ordered that the costs of all parties as taxed by the Court be first paid out of the proceeds of the property, and that the balance be then applied towards payment of what shall be found due to the Plaintiffs for principal and interest thereon as aforesaid."

The Recorder determined that the directors of the company had no power to mortgage the company's property for an amount exceeding one-half of the capital actually paid up, but he considered that the directors intended to create a security without regard to the restrictions imposed by clause 50 of the company's deed of settlement, and he was of opinion that the shareholders had ratified the action of the directors in that respect.

Mr. *Cowie*, Q.C., and Mr. *E. Macnaghten*, for the Appellant, submitted that there was no evidence of ratification on the part of the shareholders of a charge or lien in favour of the bank on the company's property in excess of the borrowing powers of the directors. The directors were prohibited by the company's deed of settlement from mortgaging the company's property for an amount exceeding one-half of the actually paid-up capital of the company, and consequently the security created by the deposit of the title deeds of the company's property at *Rangoon* with the *Union Bank* must be taken to have been intended to be, and must be limited accordingly. They distinguished between the pledge and the borrowing by the directors, and submitted that there was no ratification of either the one or the other by the shareholders. Moreover, any ratification, except in the manner described in the Act of 1862, could be of no avail. If it were shewn that all the shareholders individually had assented to the acts of the directors in this case, it could not avail as a ratification, for they could not by any assent, or by any act not authorized by law or by the constitution of the company, prejudice the position of future shareholders, nor that of simple contract creditors. Having regard

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to the constitution and objects of the company, it was most essential to limit at least the mortgaging powers of the directors. They referred to *Hutton* v. *Scarborough Hotel Company* (1). The position of directors is that of agents of the company, with special and limited powers. They are also trustees, and if they shew that they have expended moneys for the benefit of the company, they are entitled, as between the company and themselves, to be repaid. They referred to *The Electric Telegraph Company of Ireland, Troup's Case* (2); and *Hoare's Case* (3); *Lindley* on Partnership [last Ed.], pp. 780, 782; *Re Pooley Hall Colliery Company* (4). They submitted that the decree appealed from was erroneous, and ought to be varied by declaring that the charge or lien in favour of the *Union Bank* is valid only to the amount of one-half of the actually paid-up capital of the company.

Mr. *Benjamin*, Q.C., and Mr. *Murray*, for the Respondent, contended that the decree of the Court below was right; that the bank had a valid equitable mortgage on the property for the full amount found to be due in respect thereof. The limitation in Art. 50 on the power of the directors, whether of borrowing or of mortgaging, was not a limitation of the powers of the company or of the whole body of the shareholders. It did not affect the constitution of the company; it simply restricted the agency of the directors. Consequently any act of the directors, whether of borrowing or of mortgaging, in excess of their powers could be ratified by the company; and such ratification was effected in accordance with the rules of the company, so as to render the acts of the directors binding upon the company. Moreover the excess of authority was a matter between the shareholders and the directors, and did not affect the Respondent. The bank had notice under Art. 50 that the directors had power to borrow or mortgage under certain conditions, and it would be unnecessary for it to inquire further. It might assume that the conditions had been duly observed, and treat their performance or breach as a matter which affected the shareholders only. They referred to *Phosphate*

1 Eq. N.S. 557, 549

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(1) 2 Drew. & Sm. 521; affirmed 4 De G. J. & S. 672.
(2) 29 Beav. 353. (3) 30 Beav. 225. (4) 18 W. R. 201.

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of Lime Company v. *Green* (1); *Story* on Agency [4th Ed.], pl. 250; *Royal British Bank* v. *Turquand* (2).

Mr. *Macnaghten* replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decree of the Recorder of *Rangoon* in a suit in which the Respondents, suing in the name of their inspector, were Plaintiffs, and the Appellant was one of the Defendants.

The suit was brought to recover the sum of £15,296. 17*s.* 6*d.*, for money advanced by the bank to the *Oriental Rice Company, Limited*, and to enforce an equitable mortgage as a security for the advances.

The Plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the company of certain title deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of *Rangoon* for securing the repayment of the said sum of £15,296. 17*s.* 6*d.*, and that upon non-payment of that amount the Defendant might be foreclosed from his equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the said sum, or such other sum as the Court might find to be due to the Plaintiffs, with interest and costs.

The company were made co-Defendants in the suit, but they did not appear or defend.

The Defendant (Appellant) claimed the property under a purchase at a sale in execution of a decree against the company, by which he acquired the right, title, and interest of the company, and nothing more. That purchase was made on the 31st of May, 1872.

The principal question to be decided is what is the sum for which the *Union Bank* is entitled to a charge upon the property. On the part of the bank it was contended that they are entitled to

(1) Law Rep. 7 C. P. 43.

(2) 5 E. & B. 248; 6 E. & B. 327.

1 Jur N.S. 1086.

a charge for the full amount claimed, and on the part of the Defendant (Appellant), that the charge is limited to the amount of one half of the actually paid-up capital of the company, which paid-up capital the Appellant in his written statement alleged was never more than £17,100.

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital.

Their Lordships then expressed their opinion upon the point, and stopped the learned counsel for the Respondent. They were of opinion that it should be taken at £17,100, the amount found by the learned Recorder.

The company was originally formed in the colony of *Victoria* by articles of association, dated the 25th of April, 1861, and on the 18th of August, 1864, it was duly registered as a company limited by guarantee under an Act of the Legislature of *Victoria*, which followed and adopted the provisions of the *Companies Act*, 1862.

By that registration the company, by virtue of the section of the Colonial Act corresponding with sect. 196 of the *Companies Act* of 1862, became subject to all the provisions, so far as they are applicable to the present case, of the Colonial *Companies Act*, in the same manner in all respects as if it had been formed under that Act.

The articles of association contained no restriction or limitation on the company's power of borrowing.

As regards the directors, however, their authority to borrow was limited; for it was expressly stipulated by Art. 50 of the articles of association, which were registered under the *Companies Act*, and of which the bank was bound to take notice, "that subject and without prejudice to the power therein given to the meetings of shareholders and the conditions and restrictions therein contained, the directors for the time being should have, amongst others, the following powers, that is to say, the power of borrowing and taking up on the credit of the said company or of its property any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time*, one-half of the then actually paid-up capital of the said company, and that for the purpose of securing any sum or sums which might be so borrowed by the directors, they should be at liberty to mortgage, with or without power of sale, and otherwise to charge and incumber, all or any part of the property, estate, and effects, real and personal, of the said company, and to accept, make, or indorse, any bill of exchange or promissory note on behalf of the said company, or to overdraw the account of the said company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said company, and the affairs and concerns of the said company, both in *India* and *Victoria* and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said company, both in *India* and *Victoria* and elsewhere, according to the provisions and subject to the restrictions of the said articles of association, should be confided to and be under the direction of the said directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the directors to borrow or take up upon the credit of the company as an existing debt at the same time an amount or amounts exceeding one-half of the actually paid-up capital of the company. There is no doubt that the authority of the directors, limited as it was by the articles of association, was capable of being extended under the provisions of Art. 31. But by that article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The article is in the following words:—

"One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of the provisions or powers herein contained, or to remove any director or trustee, or to increase or diminish the number of directors, but that upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the directors either to borrow or to mortgage was ever extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned counsel for the Respondent, that the limitation of the power of borrowing and of mortgaging, contained in Art. 50, was merely a limitation of the authority of the directors conferred by the same article; that it was not part of the constitution of the company, which, if the company had been originally formed under the *Companies Act* of 1862, must have been contained in the memorandum; and, consequently, that it was not a limitation of the general powers of the company, or of the whole body of shareholders; and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the directors in borrowing in excess of their authority were ever duly ratified by the company.

The learned Recorder considered that there was sufficient evidence to shew that the shareholders acquiesced in and approved of the acts of the directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorize an act, cannot give it validity by ratifying it.

By the 21st of the articles it is provided that an ordinary half-yearly meeting shall be held during the months of October and April in each year.

By the 22nd, that an extraordinary general meeting may be called at any time for a special object.

By the 25th, that a notice shall be sent to each shareholder, stating the day and place of the meeting, and "also the business proposed to be transacted thereat."

By the 26th, that at every general half-yearly meeting the accounts and a statement of the company's affairs, &c., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the directors or auditors, so as to bind all the members for the time being of the company, and all persons claiming under them."

The notice that a half-yearly meeting was to be held would sufficiently indicate that it was for the purposes mentioned in Art. 26, but would not indicate that it was for any other purpose.

The report of the directors referred to in Art. 26 seems to their Lordships the same thing as the statement of the company's affairs previously mentioned in the same article. There is nothing in the articles requiring the directors to circulate the reports among the shareholders before the meetings. There is no evidence in the case that the reports were in fact circulated before the half-yearly meetings, and the form of the reports bearing dates on the days of the half-yearly meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the company), at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.

But if the object was to give the directors in future an extended authority beyond what is given by Art. 50, their Lordships think that it would be an alteration of the provisions contained in the articles which, under clause 31, could only be made by a vote of one-half of all the shareholders of the company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority, and conferring a general power to do similar acts in future.

This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings, gave validity to acts of a similar character done subsequently.

For instance, it is important in considering whether the ratification at the half-yearly meeting held on the 30th of April, 1868, of the act of the directors in borrowing £13,000 when £10,000 previously borrowed remained unpaid, if made out, so far extended the powers of the directors as to authorize them to take up as an existing debt at the same time a further sum of £23,000 when the sums of £13,000 and £10,000 should have been paid off, notwithstanding the provisions of Art. 31, which rendered the votes of one-half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February, 1871, £10,000 under the letter of credit No. 150, and £5000 under the letter of credit No. 153. The balance remaining due of all sums previously advanced by the bank had been reduced at the end of 1870 to £8. 8*s.* 9*d.*

The last general half-yearly meeting of the company was held on the 13th of October, 1869. At that meeting the directors submitted their report for the period ending the 30th of June, 1869, and that report was adopted.

According to the evidence of Mr. *Curtayne* the letter of credit No. 153 was issued on the 9th of September, 1869. The fact of the directors having obtained that letter of credit could not and did not appear in the report of the directors for the period ending June, 1869, and the act of obtaining that letter of credit or of borrowing money thereon does not appear to have been ever reported or made known to the shareholders or ratified by them. The claim therefore as to that £5000 must be rejected unless the ratification of the act of the directors in obtaining previous letters of credit for £10,000 and £5000, Nos. 150 and 141, as stated in the report of the 29th of October, 1868, which was ratified at the half-yearly meeting held on that date, authorized the directors to obtain the letter of credit No. 153 after the letter of credit No. 141

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of the 11th of September, 1868, for £5000 referred to in that report had been paid off.

Their Lordships are of opinion that the ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain the letter of credit No. 153, or to borrow the £5000 now claimed as having been advanced thereon on the 11th of February, 1871. The sum of £5000 advanced on the 17th of February, 1871, on letter of credit No. 153 must therefore be disallowed.

The only item remaining to be considered is the £10,000 advanced on the 11th of February, 1871, on the letter of credit No. 150.

That letter of credit, according to the evidence of Mr. *Curtayne*, was obtained on the 23rd of December, 1867. It authorized the *Chartered Bank of India, Australia,* and *China,* in *Rangoon,* they then being the agents there of the *Union Bank,* to honour the rice company's drafts through their manager, Mr. *Jamieson,* on the *Union Bank of Australia,* in *London* to the extent of £10,000, at any time until the 29th of March, 1869.

The obtaining of that letter of credit was mentioned in the report of the directors, presented at the meeting of the 29th of October, 1868.

The following is the statement contained in the report:—

> "In addition to the bank credit for £10,000 with which Mr. *Jamieson* had been hitherto furnished to enable him to conduct the financial wants at *Rangoon,* another credit for £5000 has been forwarded, which Mr. *Jamieson* advises will be of great assistance in his operations."

That report was read and adopted at the said meeting.

It did not necessarily follow because a letter of credit for £10,000 was obtained that the directors would act upon it, in violation of Art. 50, by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one-half of the paid-up capital of the company. The directors did not exceed the authority conferred upon them by the articles of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of £5000 might have been taken up and paid off, and then another sum of £5000 taken up under it without an excess of authority.

At the time of the adoption of the report, on the 29th of October, 1868, the letter of credit then existing was to expire on the 29th of March, 1869. It was not mentioned in the report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a limited time. It is not at all unusual, but it is not a matter of course to extend the time if the original credit has not been acted upon.

Even if the adoption of the report mentioning the credit for £10,000 authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the report to lead to the supposition that the directors had any intention to renew the letter of credit or to borrow money upon it after the 29th of March, 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for £10,000, or even to borrow upon it £10,000 at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow £10,000 at one time on the 11th of February, 1871, more than two years after the date of the meeting of October, 1868, and when the company might possibly consist of an entirely different body of shareholders.

But however this may be their Lordships are of opinion that there was no evidence to shew that any sufficient notice of the substance or effect of the reports which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the company in pursuance of the 25th clause of the articles of association so as to lead the absent shareholders to know or even to imagine that the directors intended to report that they had exceeded their authority, or that, by the adoption of the report of the directors, to be laid before the meeting, an act of the directors in excess of their authority could be rendered binding upon the whole body of shareholders.

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Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the company would have become charged as a security for the repayment of the amount.

The case of *Royal British Bank* v. *Turquand* (1), and the same case in error (2), were cited in the course of argument to shew that the excess of authority was a matter only between the shareholders and the directors, and that it does not affect the rights of the bank. In that case it was said by Chief Justice *Jervis*: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the statute and the deed of settlement; but they are not bound to do more. The party here (that is in *Turquand's Case*) on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the bank had referred to clause 50 of the articles of association they would have found that the directors were expressly prohibited from borrowing beyond a certain amount.

The case of *Royal British Bank* v. *Turquand* (1) was decided with reference to a company registered under 7 & 8 Vict. c. 110, and Chief Justice *Jervis* remarked that the lender finding that the authority might have been made complete by a resolution would have had a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done. In the present case, however, the bank would have found that, by the articles of association, the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the directors by Art. 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of sect. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of sect. 53 of the *Companies Act*, and would have been found amongst his records.

Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of *Royal British Bank* v. *Turquand* (1).

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(1) 5 El. & Bl. 248. 1 Jur NS 1086 (2) 6 El. & Bl. 327. 2 Jur NS 664,

It is unnecessary to consider what would have been the rights of the bank if the amount which they advanced had not been more than one half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the bank, would have exceeded the amount which the directors were authorized to borrow. In the present case, the £10,000 and £5000 were both lent by the bank itself.

It was argued that the advances made by the bank under the letter of credit did not amount to a lending by the bank or a borrowing by the directors. There is nothing in that objection. If, however, it was not a borrowing, the directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repayment of it. It was only for securing moneys borrowed that the directors were authorized to mortgage or charge the property of the company.

For the above reasons their Lordships are of opinion that the Plaintiffs are not entitled as against the Defendant to a charge on the property beyond the amount of one half of £17,100, the paid-up capital of the company.

The amount therefore allowed to the Plaintiffs by the decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the decree be reversed, and that it be declared that the Plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of £8550 only.

It was objected at the hearing on the part of the Appellant that the decree ought to have been for a foreclosure, and not for a sale, but at the close of the case their Lordships were informed that the property had been sold under the decree, and that the money had been deposited in Court; and that the Appellant does not object to the sale.

Their Lordships will therefore further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the Plaintiffs and of the Defendant respectively, as taxed by the

(1) 5 El. & Bl. 248. 1 Jur N.S. 1086

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lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the Plaintiffs a sum of rupees equivalent, at the rate of exchange current between *Rangoon* and *England* at the time of the filing of the suit, to the principal sum of £8550, with interest thereon, at the rate of 8 per cent., from the 5th of October, 1872, to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the Defendant Appellant.

The Respondent must pay the costs of this appeal.

Solicitors for the Appellant: *Lawford & Waterhouse*.
Solicitors for the Respondent: *Murray, Hutchins, & Co.*

[PRIVY COUNCIL.]

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THE ROYAL MAIL STEAM PACKET COMPANY . . . . DEFENDANT;

AND

ROBERT BUTLER BRAHAM . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Jamaica Act, No. 41, *of* 1872, *s.* 19—*Service of Summons on a Company domiciled abroad—"Person residing out of Jamaica."*

In an action against the Appellant company (incorporated by letters patent of the Queen, and domiciled in *England*) a writ of summons was served, in pursuance of a Judge's order to that effect previously obtained, on its duly appointed superintendent carrying on its business in *Jamaica*:—

Held, that this was good service on the company under sect. 19 of "the *Supreme Court Procedure Law*, No. 41, of 1872." The section applies to corporations as well as to natural persons.

Ingate v. *Lloyd Austriaco* (1) commented upon.

THIS was an appeal against the refusal of the Supreme Court to set aside an order of Mr. Justice *Ker*, a Judge of that Court,

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323. 4 Jur. N.S. 75.

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ordering that substituted service of the writ and other proceedings in an action brought in the said Court by the Respondent against the Appellant, should be effected on the Appellant's superintendent in *Jamaica.*

An action was commenced in the Supreme Court by the Respondent against the Appellant company by writ of summons, filed May 25, 1875. The action was brought to recover damages for the alleged loss of certain goods said to have been delivered by the Respondent to the Appellant for carriage from *Kingston,* in *Jamaica,* to *Southampton.*

On the 28th of October, 1875, Mr. Justice *Ker,* upon an application *ex parte* by the Respondent, ordered that the writ and all subsequent proceedings in the action should be served on Mr. *Cooper* on behalf of the Appellant company.

An application by the Appellant to set aside this order was, on the 11th of November, 1875, dismissed with costs; no appearance was entered to the writ; interlocutory judgment was signed on the 20th of November, 1875.

On the 8th of February, 1876, an application by the Appellant to set aside the order of the 28th of October, 1875, was refused.

The facts are stated in the judgment of their Lordships.

Mr. *Finlay* (Mr. *Day,* Q.C., with him), for the Appellant, contended that the order of the 28th of October, 1875, for substituted service, the service of the writ, and all proceedings thereon, ought to be set aside. The decision in the case of *Ingate* v. *Lloyd Austriaco* (1), that service could not be effected under the English *Common Law Procedure Act,* 1852, upon a corporation abroad, governs the present case. The *Jamaica Procedure Law,* No. 41, of 1872, is modelled after the *Common Law Procedure Act,* 1852, sects. 16 and 17, being the same in both, and sects. 18 and 19 of the *Jamaica* law being supplementary to the provisions of sect. 20, which are adopted from the English Act. Sect. 16 of the *Jamaica* Act is inapplicable to this case, the Appellant corporation not being resident in *Jamaica,* and not having therein any officers such as are mentioned in that section. The Appellant

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(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323. 4 Jur NS. 975.

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corporation is not a person within the meaning of sect. 19; for it does not carry on any plantation, cattle-pen, trade, or business within the meaning of that section. Sect. 19 is applicable only to natural persons, and sect. 20 is clearly inapplicable to corporations, while it appears from the concluding words of sects. 18, 19 that these sections and sect. 20 are *in pari materiâ*. The *Procedure Law*, 1872, does not contain any provisions for the service of process upon corporations not resident in *Jamaica*. Outlawry was the only means of compelling persons out of the jurisdiction to appear in the English Courts prior to the *Common Law Procedure Act*. He referred to *Newby* v. *Von Oppen* (1), explained by *Mackereth* v. *Glasgow and South Western Railway Company* (2). See also authorities upon the construction of sect. 60 of the English *County Court Act*, 9 & 10 Vict. c. 95; *Shiels* v. *Great Northern Railway Company* (3).

Mr. *Cohen*, Q.C., and Mr. *Heslop*, for the Respondent, submitted that the order appealed from was right. The cause of action arose within the jurisdiction, in respect of a breach of contract made within the jurisdiction. The Appellant is a corporation, liable to suit in any Court of law and equity wherever it can act and transact business consistently with the conditions and provisions of its charter. At the time of making and filing the affidavit on which to found the order of the 28th of October, 1875, the chairman of the directors of the corporation, and its clerk, treasurer, and secretary, were "persons residing out of *Jamaica*," and Mr. *Cooper* was the "servant" of the Appellant within the meaning of sect. 19 of the *Jamaica* Act, 41 of 1872. The Appellant company carried on business in *Jamaica*, and had no agent in the island authorized to bring actions for it. The Court was authorized to exercise its discretion in the matter, and properly exercised such discretion. They referred to sect. 6 of *Jamaica* Act, 18 Vict. c. 31, an interpretation Act; *Sheehy* v. *Professional Life Assurance Company* (4); *Newby* v. *Von Oppen* (5); *Scott* v. *Royal Wax Candle Company* (6); and to Mr. Justice *Quain's*

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(1) Law Rep. 7 Q. B. 293.
(2) Law Rep. 8 Ex. 149.
(3) 30 L. J. (Q.B.) (N.S.) 331. 7 Jur. N.S. 631
(4) 3 C. B. (N.S.) 597. 4 Jur. N.S. 17
(5) Law Rep. 7 Q. B. 293.
(6) 1 Q. B. D. 404 (April 10, 1876).

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observations at p. 409: "With regard to sect. 19 of the *Common Law Procedure Act*, 1852, and the decision in *Ingate* v. *Lloyd Austriaco* (1), that sect. 19 did not apply to a foreign corporation. I should like to have that decision re-considered if necessary."

Mr. *Finlay* replied.

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March 10.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The only question in this appeal is, whether the service of a writ of summons, issued by the Supreme Court of *Jamaica* against the *Royal Mail Steam Packet Company*, which was made on the superintendent of its business in *Jamaica*, is good service upon the company, under the Colonial Act regulating the procedure of the Court. It is a point of considerable practical importance.

The Appellant company was incorporated by letters patent of the Queen for the purpose of providing steam vessels, and of employing them upon such stations as might, from time to time, be contracted for by the proper authorities, for the transmission of mails to and from *Great Britain*, the *West Indies*, *North* and *South America*, and such other foreign parts as the public service might require. By the terms of the letters patent the meetings of the members of the company were to take place in *London* or *Middlesex*, and the directors had power to appoint agents, officers, and servants of the company "as well in the *United Kingdom* as abroad."

The principal offices of the company are in the City of *London*, and its domicil may be regarded as being in *England*.

Its business consists in carrying mails, passengers, and goods, in its steam vessels. One of the stations of the company is *Kingston*, in the Island of *Jamaica*, where the business of receiving and forwarding mails, passengers, and goods, between *Jamaica* and places out of that island, is carried on by a superintendent of the company appointed by the directors.

At the time of the issuing of the writ, Mr. *Cooper*, formerly a captain in the Royal Navy, was such superintendent, and the service of the writ was made upon him.

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(1) 4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323.

4 Jur NS 975.

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A Judge's order allowing such service had been previously obtained. An application made by the company to rescind it, and to set aside the service of the writ, was, by another order, dismissed. The present appeal is against these orders.

The action was brought to recover damages for the loss of goods alleged to have been delivered by the Respondent to the company in *Jamaica* to be carried for hire to *Southampton* in *England.* The contract, therefore, must be regarded, for the present purpose, as made in *Jamaica.*

The question turns upon the construction of the 19th section of "the *Supreme Court Procedure Law,* No 41 of 1872." This section is one of three relating to the service of writs "in any action against a person residing out of *Jamaica,*" viz., the 18th, 19th, and 20th.

The 18th and 19th sections provide for substituted service on an agent of the Defendant; the 18th enacting that "where the Defendant has in *Jamaica* an agent authorized to bring actions for the Defendant," service upon such agent shall be equivalent to service upon the Defendant.

The 19th section provides for the case where the Defendant has no such agent as is mentioned in sect. 18, and is as follows:—

"Sect. 19: In any action against a person residing out of *Jamaica,* it shall be lawful for the Court or a Judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of a breach of contract made within the jurisdiction, and that such person carries on in *Jamaica* any plantation, cattle-pen, trade, or business, and that he has no known agent in *Jamaica* on whom service can be effected under the last preceding section, and that the action is one which, in the opinion of the Court or Judge, may properly proceed, under this section, to order that service of the writ and of all subsequent proceedings in the action, may be made on any servant or agent in *Jamaica* engaged in carrying on for such person such plantation, cattle-pen, trade, or business, and in such manner and at such place (if the Court or Judge think fit to fix any place) as to such Court or Judge seems fit. The Court or Judge may direct such advertisements (if any) to be made in any newspaper as the Court or Judge may think fit concerning such order or such service, or any subsequent proceedings in the action. Service under this section shall be equivalent in all respects to service upon the Defendant, and the provisions of sect. 17 shall apply to the service of a writ of summons under this section. It shall not be compulsory upon a Plaintiff to proceed under this section in any case, but he may, if he think fit, proceed instead under sect. 20 of this law."

Sect. 20, thus referred to, prescribes the manner of personal service upon a person residing out of *Jamaica.*

It was contended for the Appellants that the enactment in the 19th section applied only to natural persons; but their Lordships see no reason thus to limit its operation. "Person," when used in a legal sense, is an apt word to describe a corporation as well as a natural person. Nothing in the context, nor in the object of the enactment in question, indicates an intention to limit its application to the latter. The purpose was to enable those who entered into contracts in *Jamaica* with persons residing out of the island, but carrying on business by means of agents there, to sue them on such contracts in the Supreme Court of the colony.

It is obvious that this power is as necessary and convenient in the case of corporations as in that of natural persons.

It was argued that the words "residing out of *Jamaica,*" indicated an intention to confine the provision to the latter; but the word "residing" is no more inapplicable to a corporation than "domicil," which is frequently used with regard to the supposed local habitation of corporate bodies.

The learned counsel for the Appellants strongly relied on a decision of the Court of Common Pleas (*Ingate and another* v. *Lloyd Austriaco* (1)), which held that the 19th section of the *English Common Law Procedure Act,* 1852, enabling a person "residing out of the jurisdiction of the Courts, and not being a British subject," to be personally served, does not apply to foreign corporations carrying on their business abroad.

Whatever may be the authority of this case upon the construction of the English *Procedure Act,* it ought not, in their Lordships' view, to govern their decision in construing the 19th section of the

(1) 4 C. B. (N.S.) 704. 4 Jur N.S. 975.

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Jamaica Procedure Law. It is to be observed that the 19th section of the English Act is analogous to, but by no means identical with, the 20th section of the *Jamaica* Procedure Law, and relates to personal and not to substituted service.

The 18th and 19th sections of the Colonial law, providing for substituted service on the agent of the Defendant, are not found in the English Act. Their provisions are very analogous to those contained in the 9th section of the Irish *Common Law Procedure Act* (13 & 14 Vict. c. 18). This section of the Irish Act was considered by the English Court of Exchequer Chamber in the case of *Sheehy* v. *Professional Life Assurance Company* (1). In that case an English corporation, carrying on the business of life assurance, and having its domicil in *England,* was the Defendant; and the Judges forming the Court were of opinion that substituted service on an agent in *Dublin,* employed by the company to obtain life assurances there, was good.

Their Lordships think that this decision strongly supports the view they are disposed to take of the proper construction of the *Jamaica* Procedure Law.

The case of *Newby* v. *Colt's Patent Fire Arms Company* (2) was also relied on by the counsel for the Respondent. That was the case of an American corporation having its head office and principal business in *America,* but also carrying on business in *England.* The *ratio decidendi* appears to have been that the corporation had a domicil in both countries, and the service on the manager and head officer in *England* was held to be good, not as substituted, but as normal service. That case, therefore, is not strictly relevant to the present.

The Respondent's counsel contended that "person" in the section in question must be interpreted to include a corporation by virtue of an Interpretation Act passed in the colony, having for its object to shorten the language used in the Acts of the Legislature (18 Vict. c. 31). They referred to the following words in sect. 6: "And words importing the masculine gender shall be deemed and taken to include females; and the singular shall be taken to include the plural, and the plural the singular; and to include bodies politic, corporate, and collegiate, aggregate or sole,

(1) 3 C. B. (N.S.) 597. 4 Jur
N S 27

(2) Law Rep. 7 Q. B. 293.

ecclesiastical and lay; as well as individuals, unless the contrary is expressly provided." It was contended that the word "person" must be implied before the words "to include bodies politic," and it was suggested that the omission of it was due to accident or oversight. Whether this suggestion is correct or not, it would seem that "person" or some equivalent word must be implied and read into the enactment to make sense of it. But be this as it may, it is not necessary, in their Lordships' view, to resort to this clause to support the construction they are disposed to put on the word "person" in the Procedure Law.

It was further objected for the Appellants that the company does not carry on any trade or business in *Jamaica* within the meaning of section 19 of the Procedure Law. No doubt the company's superintendent in the island deposes in terms in his affidavit that the Appellants do not carry on any business in *Jamaica;* but this is clearly an inaccurate statement. The true facts appear to be fairly stated in the Appellants' case, in the following passage:—

"The Appellants do not carry passengers or goods from one part to another of the island of *Jamaica;* they do not carry on any trade or business in *Jamaica,* otherwise than by the receiving and carriage of the mails, and of passengers and goods between *Kingston* in *Jamaica* and other places out of *Jamaica.*

Now what is thus stated to be transacted in *Jamaica* is precisely the business, and the only kind of business, which the Appellants under their charter can properly carry on anywhere. It is in all its branches carried on in *Jamaica* by the superintendent of the company, who is necessarily entrusted with the power of local management, and of making contracts for the conveyance of passengers and goods. The assertion in Mr. *Cooper's* affidavit "that he is simply a superintendent to carry out the orders and directions of the corporation's office in *London,*" can be true only in a limited sense. He is, of course, subject to the orders and control of the directors of the company, as subordinate agents in all such cases must be, but his being so does not tend in the least degree to negative the fact that the company is carrying on its business by means of his agency, in *Jamaica,* and their Lordships have no difficulty in affirming that it is so carrying it on.

The case on this point is analogous to that which existed in

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the action of *Sheehy* v. *Professional Life Assurance Company* (1), already referred to, where the English assurance company was held to carry on business in *Dublin* by employing an agent there to obtain insurances for them.

For these reasons their Lordships think the orders appealed from are correct; and they will humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Wilson, Bristows, & Carpmael.*
Solicitors for the Respondent: *Oliver & Sons.*

[PRIVY COUNCIL.]

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Feb. 13, 14.

JOSEPH WILSON, OWNER OF THE SHIP "UNDERWRITER" . . . . APPELLANT;

AND

THE CANADA SHIPPING COMPANY, OWNER OF THE SHIP "LAKE ST. CLAIR" RESPONDENT.

ON APPEAL FROM THE ADMIRALTY COURT OF QUEBEC.

Collision—Ship in Stays—Rule of Navigation

5 PD 24

When a port-tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard-tacked vessel.

A starboard-tacked vessel, when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision.

Both vessels were held to blame for the collision.

THIS was an appeal from the decree of the Vice-Admiralty Court of *Quebec*, in a cause of damage brought by the Appellant as owner of the ship *Underwriter*, against the *Lake St. Clair*, owned by the Respondent company, for the recovery of damage caused by loss arising from a collision which happened between the two ships.

* *Present:*—SIR JAMES W. COLVILE, SIR ROBERT J. PHILLIMORE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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(1) 3 C. B. (N.S.) 597. 4 Jur NS 27

The action was commenced on the 10th of August, 1875, and the libel in effect alleged that the *Underwriter*, while close hauled on the starboard tack, came into collision with the *Lake St. Clair*, which was close hauled on the port tack, and that the *Lake St. Clair*, though hailed, did not give way, and that the collision was entirely due to the negligence of the *Lake St. Clair*.

The Respondents, by their responsive allegation filed the 14th of August, 1875, in effect alleged that the *Lake St. Clair* was at the time of the collision in stays and unmanageable, and that the *Underwriter*, though aware of this, recklessly ran into her.

A cross action was brought by the Respondents, as owners of the *Lake St. Clair*, on the 16th of August, 1875, and on the 10th of September an order was made by consent consolidating the two actions.

Evidence having been taken, the effect of which is sufficiently stated in the judgment of their Lordships, questions were submitted to the nautical assessors, and answered by them as follows:—

1. Was the *Lake St. Clair* in stays helpless and unmanageable at and before the time of collision, and how long?—*A.* She was, and according to the evidence, from ten to fifteen minutes before the collision.

2. Was the *Underwriter* notified in sufficient time of the *Lake St. Clair* being in stays helpless and unmanageable, and, if so, could she have taken any and what steps whereby the collision complained of in this case could and would have been prevented?—*A.* Yes; and there were two things that she could have done, she could have put her helm a-starboard or hove everything aback; either of these courses would have prevented a collision.

3. Was either and which of the above-named vessels to blame for this collision?—*A.* We entertain no doubt of its being owing solely to the negligence and unseamanlike conduct of the officers in charge of the *Underwriter* immediately previous to the collision that it occurred, and that the persons in charge of the *Lake St. Clair* were in no way to blame for it.

On the 12th of November, 1875, the Court gave judgment, approving the answers of the nautical assessors, and dismissing the action of the Appellant with costs, and decreeing damages and costs to the Respondent company in the cross action.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the Appellant.

Mr. *Butt*, Q.C., and Mr. *Bompas*, Q.C., for the Respondents.

Reference was made during the argument to the Canadian Act, 31 Vict. c. 58, s. 2, and the rules thereunder for the prevention of collisions numbered 12, 17, 18, 19, and 20; and to *The Agra and Elizabeth Jenkins* (1); *The Franconia* (2); *R.* v. *Keyn* (3).

The judgment of their Lordships was delivered by

SIR ROBERT J. PHILLIMORE:—

This is an appeal from the Vice-Admiralty Court of *Quebec* in a case of collision which took place between twelve and one o'clock in the morning of the 26th of July in the year 1875. The place of the collision seems to have been off Cape *Rosier*, in the Gulf of *St Lawrence.* The ships that collided were two large vessels, the *Lake St Clair,* an iron ship of 1061 tons, with a general cargo and a crew of thirty-one hands, bound for *Montreal*, and the *Underwriter*, a full-rigged ship of 1481 tons, in ballast, with a crew of twenty-three hands, bound for *Quebec.* The nature of the damage inflicted was this,—the *Lake St. Clair* was struck at about right angles, sixty feet from the stern on the starboard side abaft the main-rigging, the bow of the *Underwriter* passing between her main topmast backstays and mainmast stays. Both these vessels were on tacks beating up the river *St. Lawrence*, and the learned Judge of the Court below, after consulting his nautical assessor, in a judgment which bears the marks of great pains and care, came to the conclusion that the *Underwriter* was alone to blame for this collision. With that judgment their Lordships are unable wholly to concur.

In the judgment which their Lordships are about to deliver, they are disposed to assume generally the facts stated on behalf of the *Lake St. Clair* as the foundation for that judgment; that is to say, they are of opinion that she had not any way upon her at the time of the collision, though they are also of opinion that the *Underwriter* could not see the state of her canvas, or so discover that she was in that condition. It is unnecessary to go into an earlier part of the history of this case, upon which, though much discussed in the Court below, the determination of this appeal, it is now admitted, does not depend. The vessels had tacked shortly before the occurrence which led to the collision. At that time the *Lake St. Clair* had come round upon the port tack, and the other vessel, the *Underwriter*, was upon the starboard tack, seeing the green light of the *St. Clair*. Now there is no doubt that, according to the general rule of navigation, it is the duty of the port-tacked ship to get out of the way of the starboard-tacked ship; but her defence in this case was that she had thrown herself into stays, and that she was helpless and unmanageable at the time of the collision; and, therefore, that the other vessel, though according to the general law it was her duty to keep her course, seeing, as she ought to have seen, and knowing, as she ought to have known, the helpless state of the *Lake St. Clair*, ought to have executed some manœuvre herself,—the nature of which will presently be adverted to,—which would have prevented the collision.

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(1) Law Rep. 1 P. C. 501; 16 L. T. (N.S.) 755.

(2) 35 L. T. (N.S.) 721.

(3) 2 Q. B. D. 90; 2 Ex. D. 63.

In this case some nautical questions of considerable difficulty and nicety are raised, and their Lordships have thought it proper to consult very carefully with their nautical assessors and to put to them certain questions, the results of which I am about to state, so far as they have been adopted by their Lordships.

The first question which requires to be decided appears to be the following:—Was the *Lake St. Clair*, in the circumstances of the case, and having regard to her position relatively to the *Underwriter*, justified in tacking at all in the face of that vessel? After consultation with the nautical assessors, this question must be answered, their Lordships think, in the affirmative. They think there was then no reason to apprehend that anything would prevent her safely executing that manœuvre at that time.

The next question is, whether if the *Lake St. Clair* had come round so as to be fairly on the port tack, and had seen the red light of the *Underwriter*, which is admitted to have been the proper light, and which, according to her own statement, was seen by her at the distance of half to three quarters of a mile, she was right in the manœuvre which she adopted, or whether she might not have taken steps which would have enabled her to get out of the way of the starboard-tacked vessel. Their Lordships, after consultation with their nautical assessors, are of opinion that the *Lake St. Clair* ought to have braced her head-yards abox, and not to have hauled her fore-yard, as it is admitted she did, and thus she would have been enabled to give herself stern-way; and, moreover, would have allowed the *Underwriter* to go safely ahead.

For these reasons their Lordships think that the *Lake St. Clair* is to blame.

In these circumstances their Lordships have had to consider whether the *Underwriter* was not fairly apprised of the condition in which the *Lake St. Clair* was, and whether, on being so fairly apprised, there were not manœuvres which she could have executed which would have, on her part, prevented the collision; it being perfectly clear that though the port-tacked vessel is to get out of the way of the starboard-tacked vessel, and the starboard-tacked vessel is to keep her course, that rule of navigation does not mean, and never has been construed to mean, that the starboard-tacked vessel is to obstinately continue on her course when she sees that, in the particular circumstances, by a variation from it she can avoid a collision. It has been already mentioned that their Lordships are of opinion that the *Lake St. Clair* did not apprise the *Underwriter* of her incapacity to take the proper manœuvres incident to a port-tacked ship by the state of her canvas; for the fair result of the evidence appears to be, that the state of her canvas was not visible on board the *Underwriter*. But it seems to be a fact in the case, which is well established, that those on board the *Lake St. Clair* did hail to those on board the *Underwriter* at a sufficient distance to apprise them of the condition which they were in; this hailing took place when the vessels were, in their Lordships' judgment, so far apart as to allow a sufficient interval of time to warn the *Underwriter*, if she had attended to the hailing which reached her. It has been suggested that the *Underwriter* ought to have starboarded her helm, and could so have avoided the collision. Their Lordships, after consultation with their nautical assessors, are of opinion that that would not have been a proper manœuvre, but that the *Underwriter* ought to have executed another manœuvre, namely, to have put her helm down at an earlier period than she did, that is, at the moment when the hailing first reached her, which it is clear she did not do, and which if she had done would have avoided the collision,—she

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would have brought her head to the wind, and there would have been no collision.

Their Lordships are therefore compelled to find that the *Underwriter* was also to blame for this collision; and the decree which they will humbly advise Her Majesty to make will be as follows: To reverse both the decrees of the Court below, there being cross-suits in this case, and to declare in both suits that both ships are to blame; that the damages be assessed according to the Admiralty rule; and that each party must bear their own costs in the Court below and of this appeal.

Solicitor for the Appellant: *T. Cooper.*
Solicitors for the Respondents: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

J. C.*
1877
Jan. 18, 19, 20;
Feb. 14.

THE DIRECT UNITED STATES CABLE COMPANY, LIMITED . . . . . . Defendants;

AND

THE ANGLO-AMERICAN TELEGRAPH COMPANY, LIMITED, AND THE NEW YORK, NEWFOUNDLAND, AND LONDON TELEGRAPH COMPANY, CONSOLIDATED WITH AND MERGED INTO THE SAID ANGLO-AMERICAN TELEGRAPH COMPANY, LIMITED . . . . Plaintiffs.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Legislature of Newfoundland—35 & 36 *Vict.* c. 45—*Territorial Dominion—Bays—Injunction—Exclusive Use of Territory for Telegraphic Communication—Newfoundland Act,* 17 *Vict.* c. 2.

Injunction granted by the Supreme Court of *Newfoundland* to prevent Appellants from infringing certain exclusive rights granted to the Respondent company under 17 Vict. c. 2.

It appeared that the Appellants had brought and laid a telegraph cable to a buoy more than thirty miles within *Conception Bay*, which lies on the east of *Newfoundland*, between two promontories distant rather more than twenty miles, the average width of the bay being fifteen miles, the distance of the head of the bay from the two promontories being respectively forty and fifty miles. The said buoy and cable were more than three miles from the shore of the bay.

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* *Present*:—Lord Blackburn, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Held, (1), that according to the true construction of 17 Vict. c. 2, the intention of the Legislature of *Newfoundland* was to prohibit for the benefit of the Respondent company the use of any part of the territory of *Newfoundland* by any other person for telegraphic communication, whether within the island or as a mere means of transit between places outside the territory.

(2.) That by 59 Geo. 3, c. 38, the Imperial Legislature asserted exclusive dominion (never since questioned) over the said bay, and by 35 & 36 Vict. c. 45, conferred upon the Legislature of *Newfoundland*, the right to legislate with regard to it.

Quære, as to the territorial dominion over a bay of configuration and dimensions such as that of *Conception Bay*, either under the English Common Law or under the general law of nations.

APPEAL from an interlocutory order (April 5, 1875) of the Supreme Court of *Newfoundland*, and in effect from two prior interlocutory orders of the said Court (August 28, 1874, and January 15, 1875). Under the said orders the Appellants were restrained by injunction until the hearing of the cause, or until further order, from constructing, laying, or extending any telegraphic cable in or to the Island of *Newfoundland*, or any place within the jurisdiction of the government of the colony of *Newfoundland*.

The above-named *New York, Newfoundland, and London Telegraph Company* (hereafter referred to as the *Newfoundland Company*), was incorporated by an Act of the Legislature of *Newfoundland* (17 Vict. c. 2) intituled, " An Act to incorporate a company under the style and title of '*The New York, Newfoundland, and London Telegraph Company.*' " By that Act (sect. 6) they were required to construct, maintain, and operate a line of telegraphs, therein described as " a main or trunk line," from *St. John's* to or towards *Cape Ray*, and also from *St. John's* to or towards *Trepassey*, and any other line or lines from any point in *Newfoundland* to any other point or points therein or elsewhere, and were further empowered to construct, maintain, and operate such other lines of telegraph (described in the said Act as " branch lines ") in *Newfoundland* as therein mentioned.

Various other special powers, privileges, obligations and restrictions were by the said Act granted to and imposed on the *Newfoundland Company*. By sect. 10 and also by sect. 22 provision was made for the grant to the *Newfoundland Company*, in the events and mode therein prescribed, of so much and such parts of the ungranted lands in *Newfoundland* as in such sections respectively mentioned. The grants of land so authorized to be made might be applied for, and required by the *Newfoundland Company*, as to those provided for under sect. 10, "so soon as the said line of telegraph shall be completed from *St. John's* to *Cape Ray* or any other points on the west coast of *Newfoundland*," and as to those provided for under sect. 22, "so soon as the said company shall have actually established a communication across the *Atlantic Ocean* by means of sub-marine cable or wire from that island." By sect. 12 it was enacted that unless 2500 shares of the capital or joint stock of the said company should be subscribed "and effective operations commenced for the establishment of the said line of telegraph within one year after the passing of this Act," such Act and everything therein contained should be null and void.

By sect. 14 it was enacted as follows:—"The corporation hereby created shall have the sole and exclusive right to build, make, occupy, take, or work the said line of telegraph between *St. John's* and *Cape Ray*, or between any other points in this island (excepting only the existing line between *St. John's* and *Carbonear*) for the full period of fifty years from the passing of this Act, subject, nevertheless, to the right of pre-emption by the Government of the said colony as hereinafter provided, and during the said period of fifty years no other person or persons, body or bodies politic or corporate, shall be permitted to construct, purchase, take, or operate any line or lines of telegraph on this island, or to extend, to enter upon, or touch any part of this island or the coast thereof, or of the islands or places within the jurisdiction of the Government of this colony with any telegraph cable wires or other means of telegraph communication from any other island, country, or place whatsoever: provided, however, that if the said line of telegraph shall not have been completed from *St. John's* to *Cape Ray*, or other point on the western coast of *Newfoundland*, and a communication by telegraph across *Prince Edward Island*, or the Island of *Cape Breton*, or otherwise established with the continent of *America* within five years from the passing of this Act, the exclusive privileges granted by this section shall cease."

By sect. 15 it was enacted that:—"If at any time after twenty years from the passing of this Act it shall be deemed advisable by the governor in council that the lines of telegraph and the property of the said company shall be transferred to and vested in the Government of this island, it shall be lawful for the governor to cause a written notice to be given to the said company, which shall be served upon the president, or director, or manager in the said island, which notice shall state that the government has decided upon becoming holders of the said lines or other property;" and provision was made that upon such notice being given and such appraisement made as thereby provided for of the "telegraph lines, wires, cables, apparatus, utensils and all other property connected therewith," and after such payment or tender being made as thereby provided for or authorized, all the property so appraised should become the property of Her Majesty for her benefit and public use of the said island; and it was further provided as follows:—"But this section shall not apply to any lands granted to the said company by virtue of the 10th and 22nd section of this Act, nor the proceeds thereof, or any land or property purchased with such proceeds, nor to the bonuses to be paid to the company, or to any land or property purchased with the same, or any part thereof, nor to any mines or minerals or the property connected with the management or working of such mines or minerals."

By sect. 18 it was enacted as follows:—"The said company shall have power to establish, construct, and work a line or lines of telegraph between *Newfoundland* and *Ireland*, or any other island, place, or places in the *Atlantic Ocean*, or in *Europe*, or in the *United States*, and to construct, purchase and work any telegraph line or lines, or means of communication in *Canada*, *Prince Edward Island*, *Cape Breton*, *Nova Scotia*, *New Brunswick*, and the *United States*, and in the water adjacent to or between the said islands, provinces, or states, and between any of them and *Newfoundland*."

Another colonial statute of 1857 (20 Vict. c. 1) empowered (sect. 1) the *Newfoundland Company* to consent that the *Atlantic Telegraph Company, Limited,* might extend their submarine cable to and touch and enter upon the island of *Newfoundland* on such terms as the two companies might agree upon, and enacted that when such cable should be so extended the same should be deemed in law to have been made in compliance with the provisions of the said Act of 1854. Sects. 2 and 3 of the same Act empowered the *Newfoundland Company* to effect a consolidation of that company with the *Atlantic Telegraph Company, Limited,* or any other company, upon such terms as might be agreed on by the companies, and enacted that upon such consolidation being effected, there should be thenceforward one consolidated company, into which the *Newfoundland Company* should be merged, and that such consolidated company should have all the rights of the *Newfoundland Company.*

The above-named *Anglo-American Telegraph Company, Limited* (hereinafter called the *Anglo-American Company*) is a joint stock company duly constituted since the passing of 20 Vict. c. 1, and registered in *England* under the provisions of the Companies Acts of 1862 and 1867, and all the undertaking, property, rights and privileges of the *Atlantic Telegraph* subsequently became vested in the *Anglo-American Company.*

The amalgamation of the *Newfoundland* and *Anglo-American Companies,* empowered by 20 Vict. c. 1, was effected, and the Respondents thereupon possessed, maintained, and worked several sub-marine telegraphic cables which have been laid across the *Atlantic* from *Ireland* to *Newfoundland* and thence to the continent of *America.*

The Appellant company was constituted in the month of March, 1873, for the purpose of establishing and working telegraphs between *Great Britain, Ireland,* and *America,* either directly or through intermediate places. In the execution of this purpose the Appellants, in July, 1874, laid a submarine cable from *New Hampshire,* in the *United States,* to a point near *Torbay,* in *Nova Scotia,* and from that point towards *Ireland.* In laying the last-mentioned portion the line skirted the coast of *Newfoundland,* and the end of a portion of such cable was temporarily secured by a buoy off the coast of *Newfoundland*, while the ship came to *England* and fetched another portion of cable which was joined to the end secured off *Newfoundland*, and then paid out towards *Ireland*. The point at which the buoy was placed lay within the headlands of *Conception Bay*, and the whole cable thus formed a loop within those headlands, which are some twenty miles apart.

The Respondents filed their bill for injunction on the 6th of April, 1874, stating in substance that the Appellants had for their object and purpose the institution of telegraphic communication by submarine cables between the *United States of America* and the coast of *Ireland* by means of *Nova Scotia* and *Newfoundland*, and that by the steamship *Faraday*, and their servants or agents, they had constructed a telegraphic submarine cable from *Torbay* in *Nova Scotia* to a point in *Conception Bay*, within the jurisdiction of the Government of *Newfoundland* (which point was described), and that the Appellants intended to carry out their aforesaid object and purpose by the construction and laying of a line of submarine telegraphic cable from the coast of *Ireland* to *Newfoundland* to connect with the cable already laid down by them to the aforesaid point in *Conception Bay*, and to land their cable upon the said island, and that they had used and operated the cable so laid as aforesaid, and were using it for the purposes of telegraphic communication, and for testing it; and the Respondents prayed that the Appellants might be restrained by injunction from continuing the laying and construction of any telegraphic wire or cable within the jurisdiction of the Government of the colony of *Newfoundland*, and from using or operating the same, and from extending to, entering, or touching any part of the island of *Newfoundland*, or the coast thereof, or of the islands or places within the jurisdiction of the Government of the colony with any telegraphic cable wire or other means of telegraphic communication from any other island, country, or place, and from extending, using, or operating within the jurisdiction of the Government the cable so laid by the Appellants in *Conception Bay* as aforesaid, and from infringing in anywise the exclusive rights of the Respondents arising under the aforesaid Acts.

On the 12th of August, 1874, an order *nisi* was made by the Chief Justice for an injunction unless cause were shewn on the

15th of August following, and for an interim order of injunction to the same effect. On the 15th of August, no evidence being offered by the Appellants, the Chief Justice issued a writ of injunction substantially as prayed for, but subject to a proviso that the cable recently laid by the Appellants in *Conception Bay*, within the jurisdiction of the Government, might be there continued until further order, so long as the same should not be made a means of telegraphic communication, and that the said order should not restrain the Appellants from bringing within such jurisdiction as aforesaid and mooring therein any telegraphic cable then being laid by them, so as the same should not be landed, or brought to shore, or made a means of telegraphic communication.

In October, 1874, the Appellants filed their voluntary answer in the said cause, and thereby admitted that they had by their contractors, servants, or agents on board the *Faraday* laid and constructed a submarine cable or line of telegraph from *Torbay*, in *Nova Scotia*, to, into, and within *Conception Bay*, and under the waters of such bay to a point stated in the answer to be not the point described in the bill or near to it, but which was not otherwise defined or described in the answer, save that it was stated therein to be "more than three nautical miles from the nearest point of the shore of the colony of *Newfoundland*." They also admitted by their answer that though not specified in their memorandum of association it was within the range of the objects of their company to establish and work telegraphs in or through *Newfoundland* or *Nova Scotia*, and that they had made and were making arrangements for the effectuation of their "object and purpose aforesaid" (referring to the objects of their company), and that they intended to carry out the same by the immediate construction and laying of a line of submarine telegraphic cable from the coast of *Ireland* "to connect with the line already laid and constructed as aforesaid to the said point in *Conception Bay* aforesaid, or to some other point on the line of the said cable already laid, but not to the point described in the bill." They also admitted that they had used their cable so laid as aforesaid for the purposes of telegraphic communication, but only for testing and for service messages and not for ordinary or public messages, but they stated that it was then not used at all "except for testing."

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They also stated by their said answer as follows:—

"It is the intention of the Defendant company to observe and respect the rights (if any) of the *Newfoundland Company* and of the Plaintiffs under the said local Acts, and it is not the intention of the Defendant company to land, lay, or operate their said cable, or any part or section thereof, at any point upon the coast of *Newfoundland*, unless and until it shall have been conclusively determined that such landing, laying, and operating will not infringe any right of the *Newfoundland Company* or the Plaintiffs, or any other company, or person."

Upon the application of the Appellants a rule *nisi* was granted on the 26th of October, 1874, by which the Respondents were required to shew cause why the injunction of the 28th of August, 1874, should not be dissolved with costs upon divers grounds therein specified, and also, why, if the injunction should be continued, the Respondents should not be required to give the usual undertaking in damages, and further, why the bill filed in the same cause should not be dismissed with costs, on the ground therein stated as follows: "that it was filed and the injunction obtained on statements known by the complainants to be untrue, namely, that the Defendants purpose and intend the landing of their cable at some point upon the coast of this island, without waiting for the conclusive determination of the complainants' alleged monopoly."

A writ of injunction was duly issued, dated the 27th of November, 1874, in pursuance of the order of the 28th of August, 1874. Cause was shewn under the order of the 26th of October, 1874, and after argument the rule *nisi* was discharged and the writ of injunction confirmed, subject to the condition that the Respondents should give security to the Appellants in the sum of $40,000 to abide by any order which the Court might make as to damages. On the 3rd of February, 1875, a rule *nisi* was granted for the discharge of the order of the 15th of January, 1875, and for the dissolution of the injunction; but the said rule *nisi* was discharged by an order of the full Court on the 5th of April, 1875, and the order of the 15th of January, 1875, was thereby confirmed.

The present appeal was brought to reverse, alter, or vary the said order of the 5th of April, 1875; and that the orders of the 15th of January, 1875, and the 28th of August, 1874, might be discharged with costs.

Mr. *Fry*, Q.C., and Mr. *Percy Bunting*, for the Appellant company:—

According to the true construction of sect. 14 of the local Act, 17 Vict. c. 2 (which must be construed strictly, since it grants a monopoly, and therefore infringes the rights of the subject), the exclusive rights conferred thereby on the *Newfoundland Company* applied only to telegraphs laid upon or so as to touch the shore of the colony, and not to any telegraph laid below low-water-mark off such shore, and still less to any telegraph laid more than three miles from such shore. Such exclusive rights, moreover, according to the true construction and intention of the Act, applied only to telegraphs which established telegraphic communication with the colony, and not to any telegraphic wire which only passed under water by or along the shore of the colony from and to other places beyond the jurisdiction of the colony, without any actual stations or operating places within that jurisdiction.

Every part of the Appellant's cable was and is more than three miles distant from the shore of the colony, and the burden of proof lies on the Respondents to shew that nevertheless it is within the jurisdiction of the colony, and of the Supreme Court, and that the effect of the Colonial statutes extends beyond three miles from the shore.

Three points have to be considered with reference to the extent of territorial dominion over a bay of configuration and dimensions such as those of *Conception Bay* [For description thereof the reader is referred to their Lordships' judgment]: (*a.*) What is the law of *England* with regard thereto? (*b.*) What is international law upon the subject? (*c.*) In what terms does jurisdiction over *Conception Bay* purport to have been conferred by the Crown of *England* on the Government of the colony.

As to (*a*), there are very few English common law authorities, and these relate chiefly, as regards bays, to the question, whether a particular bay is or is not part of an English county, and so within the realm of *England* and under the jurisdiction of some one or other of the Courts. The earliest authority is in *Fitzherbert's La Grande Abridgment* (1565); *Corone et Plees de Corone*, fol. 259, placit. 399, nota, p.: "*Stanton justic q̃ ceo nest pas sañce demere ou hoe puit veier ceo q̃'est fait del ou part del ewe et del aut, coe a rier de lun terr tañq a laut q̃ le cozon viendr' en ceo cas et fra son offic auri coe auent a vyent en vu brau del mer la ou home puit vier de lun parte tanque a lauter del auer que en cel lieu auient puyt paiis auer conisans.*" See also *Staundford's* Pleas of the Crown, bk. i. p. 51. See, further, Lord *Hale's* treatise, *De Jure Maris*, c. 4. [LORD BLACKBURN referred to *Cunningham's Case* (1).] *Reg.* v. *Keyn, The Franconia Case*, judgment of *Cockburn*, C.J. (2); Co. Litt. 1st Inst. p. 260 a, *Extra regnum;* Resolution, 5 Rep. p. 107 a; *Blackstone* (*Stephen's*) Comm. vol. i. p. 110; Lord *Hale's* Pleas of the Crown, vol. ii. p. 54; Admiralty, 12th Rep. p. 79; 4th Inst. c. 22, p. 140: "It is no part of the sea where one may see what is done of the one part of the water and of the other, as to see from one land to the other, that the coroner should exercise his jurisdiction in this case."

[Mr. *Benjamin* observed that all these authorities related to the question which of the Queen's Courts is to exercise jurisdiction, and are not to the effect that the sovereign does not possess jurisdiction.]

As to (*b*), see *Grotius, de Jure Belli et Pacis,* bk. ii. ch. iii. ss. 7, 8; *Vattel,* vol. i. bk. 1, ch. xxiii. s. 291; *Ortolan's Règles Internationales et Diplomatie de la Mer* [2nd Ed.], bk. ii. ch. 8, p. 157; *Phillimore's* International Law (citing *Kent*), vol. i. s. 200 [2nd Ed., p. 238]. See also *Kent's* Com. vol. i. p. 29; *Wheaton's* International Law [*Dana's* 8th Ed.], p. 255: "The maritime territory of every state extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same state. The usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." The international writers who assert that bays are

(1) Bell's Cr. C. p. 72.

(2) 2 Ex. D. 159.

part of the territory, put it on the ground of the power to protect them. See notes to page 256, especially note of *Heffter; King* v. 49 *Casks of Brandy* (1); Treaty between *Great Britain* and *France,* 1839, Art. IX.; Anglo-French Fishery Convention of 1867 (see 30 & 31 Vict. c. 45); the Convention of 1818, which regulated fishing rights between the *United States* of *America* and the *United Kingdom*: see p. 47 of Appendix to *Consolidated Statutes of Newfoundland,* 1872. The result of the above authorities, it was contended, was that bays could only be considered to be part of the territorial waters of a state on the ground of the capacity of such state to possess them, which in turn depends on the power of such state to protect the entrance of such bay against foreign vessels, *i.e.*, on the power of exclusive occupation. Three miles must still be assumed to be the distance from which you can command it from the land. When the bay is more than six miles wide then it is open sea, and cannot be regarded as part of the territory. See, also, with regard to the limited extent of jurisdiction to be exercised over bays and gulfs of this kind, a passage cited by Chief Justice *Cockburn* in *Reg.* v. *Keyn* (2) from Professor *Bluntschli's* work, *Das moderne Völkerrecht,* Art. 310.

As to (*c*), Has there been any assertion of dominion by the Queen over this bay in respect of which she has conferred jurisdiction on the government of the colony? Was the jurisdiction of the Crown established by Parliament, and if so, was it transferred? see 59 Geo. 3, c. 38, intituled "An Act to repeal certain Acts relating to fisheries carried on upon the banks and shores of *Newfoundland, Labrador,* and Her Majesty's other possessions in *North America;*" *Clark's* Colonial Law, *Newfoundland.* See Treaty of *Utrecht,* Art. 13; Treaty of 1763 relating to the cession of *Canada,* Arts. 5, 6; the Treaty of *Versailles* of 1783, Art. 4, which are to be found in the Appendix to *Consolidated Statutes of Newfoundland,* pp. 44, 45. See also 28 Geo. 3, c. 35, which recites those provisions and enacts that the Crown may authorize the local government to fulfil the purpose of the treaty. See, also, 31 Geo. 3, c. 29; 32 Geo. 3, c. 46; 33 Geo. 3, c. 76; the Convention of 1818 above referred to, printed in the Appendix to the *Consolidated Statutes,* p. 49; 59 Geo. 3, c. 38; 5 Geo. 4, cc. 51 and

(1) 3 Hagg. Adm. 290.

(2) 2 Ex. D. 187.

67; 5 & 6 Vict. c. 120; and 10 & 11 Vict. c. 44. The word "bays" is absent from the Act under which the Supreme Court now sits. There is nothing whatever, it is submitted, in these enactments to justify argument to the effect that there has been by express legislation any treatment of this bay as part of the realm and as subject to its territorial jurisdiction. Even if there had been legislation to that effect, still the part of the bay affected by this litigation is not a part of the island which is within the jurisdiction of the local Legislature. With regard to the statutes which related to fishery questions, it must be observed that the assertion of exclusive rights of fishery, with ancillary regulations for guarding such rights, does not amount to assertion of territorial sovereignty, because exclusive rights of fishery on a large scale have always been permitted by international law.

Further, assuming the existence of a jurisdiction in the local Legislature, it is submitted that the Respondents are not entitled to the injunction. The writ is one brought by a private company in equity asking to enforce the provisions of a public Act of Parliament, and such private company must shew that substantial damage has accrued to it from the breach of such Act. The Attorney-General, suing on behalf of the public, and representing the public, would be in a different position, and the distinction is insisted upon in *Attorney-General* v. *Cockermouth Local Board* (1). No physical damage is alleged as having been done in this case, but the results of competition are dreaded. See *Calcraft* v. *West*, judgment of *Lord St. Leonards* (2).

Finally, it was submitted upon the evidence, that no consolidation or merger of the *Newfoundland Company* with the *Anglo-American Company* had ever been effected within the meaning of the local Act 20 Vict. c. 1, and, therefore, that the Respondent company was not entitled thereunder to the exclusive rights and privileges conferred upon the *Newfoundland Company* by sect. 14 of 17 Vict. c. 2. It was argued that the *Newfoundland Company* did not at the amalgamation transfer *all* its assets to the *Anglo-American*, and that the arrangements made extended to admit a third company to be also amalgamated with the *Anglo-American Company*.

(1) Law Rep. 18 Eq. 172.

(2) 2 J. & La Touche, 123.

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Mr. *Benjamin*, Q.C., and Mr. *Horace Davey*, Q.C. (Mr. *Beaumont* with them), for the Respondents:—

First, the amalgamation and consolidation of the companies was duly effected, so as, under 20 Vict. c. 1, to vest in the *Anglo-American Company* all the powers, rights, and privileges with which the *Newfoundland Company* was theretofore invested under 17 Vict. c. 2, and in particular with the exclusive rights and privileges conferred upon the *Newfoundland Company* by sect. 14 of that Act. [Counsel were stopped by the Court in arguing this point.] Such exclusive rights, according to the letter, have been infringed by the Appellants, who have laid their cable within *Conception Bay* for a considerable distance. Moreover, the express prohibition contained in this section has been infringed by the Appellants having extended their cable to and within *Conception Bay.* Though the prohibitory clause is in terms more extensive than the clause which grants our exclusive right, we are entitled to the benefit of them as supplementing and protecting our right. Construing the whole section together, the words in the prohibition must be taken in reference to the words which grant our exclusive right. Consequently the Appellants and all other persons are prohibited from laying a telegraphic wire across a portion of the island between two termini out of it, and then using the same as a stepping stone in order to facilitate telegraphic communication between such termini. Such an act is quite as much within the prohibition contained in the statute as the act which is admitted by the Appellants to be so, viz., the laying a telegraphic wire for the purpose of establishing communication with the island.

Secondly, it is a fallacy to contend that the Appellants are not chargeable with infringing the exclusive right of the Respondents, because the point to which their cable is laid is more than three miles from the shore. The point in question is as much part of the island of *Newfoundland* as if it were dry land. The three-mile rule is not applicable to this case; for in the case of a bay like this, distinctly formed by well-marked headlands, its area and waters fall within that territorial jurisdiction which includes its shores. *Conception Bay* is a bay in the sense in which that word is used by writers on international law when they lay down

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the rule that the jurisdiction of the sovereign of the territory extends over bays. It is unnecessary to lay down any abstract rule, but as a matter of fact, having regard to the extent and configuration of this bay, it is contended that it is within the territorial jurisdiction of the English Crown. All authorities concur that "parts of the sea" may be subject to territorial jurisdiction, and that bays and estuaries are parts of the sea. Those cited by the Appellant from *Coke*, and *Hale*, and *Staundford* in order to establish a particular limitation as to extent, have reference merely to the subordinate questions as to what portions of the sea were within a particular county, or within the jurisdiction of the Admiralty: see *Phillimore's* Int. Law, vol. i. p. 212, sec. 199 [Ed. 1854]; *Kent's* Commentaries, vol. i. p. 29; *Halleck's* Int. Law (American) [Ed. 1861], p. 130; *Lawrence's Wheaton* [Ed. 1863], p. 320, pt. ii. c. iv. sec. 6; *Blackstone's* Commentaries, vol. i. tit. "Prerogative," p. 110 (old Ed.); *Reg.* v. *Keyn*, judgment of *Cockburn*, C.J. (1); *Hautefeuille, Dr. des Nat. Neutres*, 2nd ed. vol. i. p. 89.

But nothing can be more vague and inconsistent than the *dicta* which have been relied on in favour of some limitation of the extent of territorial bays. *Vattel* (bk. i. c. 23) makes the test the facility of occupation, which is vague enough; and his only illustration of a bay which is *not* a territorial bay is that of *Hudson's Bay*—an unfortunate illustration, since the *Hudson's Bay Company* not only held a grant from the Crown of *England* of the exclusive right of navigation in that bay, but they exercised it until *Rupert's Land* was transferred to the Dominion of *Canada*. In like manner *Hautefeuille* gives as his only illustrations of bays which are "in reality great parts of the completely open sea," the *Bay of Biscay* and the *Gulf of Lyons*, neither of which is enclosed within the territory of a single state. It is true that in the Fishery Treaty of 1839 between *Great Britain* and *France* the bays in which exclusive rights of fishery were maintained were limited to those not exceeding ten miles in width at the opening. But even that is at all events a considerable extension of the limitation here contended for of three miles from the shore.

The only case in which the question of the territoriality of a

(1) 2 Ex. D. 159.

bay has arisen for legal decision seems to have been the case of an American vessel seized and condemned in the Vice-Admiralty Court of *New Brunswick* for fishing in the *Bay of Fundy*, as mentioned in Mr. *Lawrence's* note (p. 325) to *Wheaton*. The *Bay of Fundy* is very much larger than *Conception Bay*. There seems to have been no appeal, but diplomatic complaint was made on the subject, and it was one of the matters referred to a commission under the Convention of 1853. The commission differed as to the matter, and it went to the umpire, Mr. *Joshua Bates*, who decided indeed that the *Bay of Fundy* was not a British bay within the meaning of the fishery treaties of the *United States*. But he expressly assigned, as the ground of his decision, not only the great extent of the *Bay of Fundy*, but the facts that one of its headlands and the adjacent coast line of the bay and some of the islands within it were *part of the State of Maine.*

But *Cunningham's Case* (1) is a distinct authority as to the *Bristol Channel*, which, if not a bay, is an arm of the sea upwards of ten miles wide at the part with respect to which the decision is express, viz., where it extends between the counties of *Glamorgan* and *Somerset*. The question there arose in the strictest form, for the indictment had been found and the prisoner convicted at the *Glamorganshire* assizes, though the offence had been committed below low-water mark; so that the question was whether an arm of the sea considerably more than ten miles in width was within the body of the adjacent counties; and so it was held to be upon consideration of its situation with reference to the adjacent land and without reference to its width. But the three-mile rule contended for would not only exclude the *Bristol Channel* from the adjacent counties, but from this realm of *England;* and with it such places as *Spithead*, the *Frith of Forth*, the estuary of the *Thames* at *Sheerness*, and other places which it is hard to conceive can be excluded from our territorial jurisdiction.

All that the *Franconia Case* (2) decided was that the realm of *England* in its external coast ceased at low-water mark; that beyond that point there was a limited authority which Parliament and not the Courts *ex proprio motu* could exercise if it chose. In this case the British government has for a long period exercised

(1) Bell's C. C. p. 72.

(2) 2 Ex. D. 63.

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dominion over this bay, and their claim has been acquiesced in by other nations. Again, by express legislation of the Imperial Parliament, the bays of *Newfoundland* in particular have been treated and dealt with as part of the realm and within the territorial jurisdiction of the colonial government: see 59 Geo. 3, c. 38, ss. 3, 4, and 5 Geo. 4, c. 51, s. 2, and the Conventions of 1818 and 1872. The repealed Act of 33 Geo. 3, c. 76, which constituted the Supreme Court, also asserted jurisdiction of a very wide character. No doubt the waters of *Conception Bay* are territorial waters, and belong to the realm of *England*, but they do so as appertaining to the island, and they are in fact and in law included in the colony of *Newfoundland*. Not only have both the *Newfoundland* Acts referred to in the appeal been assented to by Her Majesty, but the Legislature of *Newfoundland* is constituted and empowered under the authority of Acts of the Imperial Parliament, 5 & 6 Vict. c. 120, and 10 & 11 Vict. c. 44; see also 35 & 36 Vict. c. 45, s. 1, Art. 32 in the schedule.

It is not necessary, in a case of this nature to shew actual damage in order to maintain an injunction. The remedy is essentially one *quia timet*; and where there is such an infringement of private right, whether of property or of statutory right in the nature of property, as in other respects is proper to be protected by injunction, it is settled doctrine that no actual injury need be shewn: *Rochdale Canal Company* v. *King* (1); *Hext* v. *Gill* (2); *Goodson* v. *Richardson* (3).

Attorney-General v. *Cockermouth Local Board* (4) was a widely different case. Where, as in cases of nuisance, a Plaintiff is injured only by the result of the acts complained of, which might otherwise, as far as he is concerned, be lawful; he must, of course, shew that injury has resulted. And so in that case, though the information succeeded because the Defendants were fouling a stream and causing a public nuisance, the bill was dismissed because no private right of the Plaintiffs had been injured, and no nuisance occasioned to him.

In *Calcraft* v. *West* (5) the decision proceeded upon the ground that the Plaintiff was a mere licensee; and that, not being an exclusive licensee, he had any right to complain of the Defendant acting without a license, any more than an ordinary licensee of a patent has to complain of its infringement by another.

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(1) 2 Sim. (N.S.) 78.

(2) Law Rep. 7 Ch. Ap. 699.

(3) Law Rep. 9 Ch. Ap. 221.

(4) Law Rep. 18 Eq. 172.

(5) 2 J. & La Touche, 123.

Mr. *Fry*, Q.C., replied.

Feb. 14. The judgment of their Lordships was delivered by

LORD BLACKBURN:—

This is an appeal from the Supreme Court of *Newfoundland* against an order confirming an injunction granted against the Appellants, to prevent their infringing the rights originally granted by an Act of the Legislature of *Newfoundland* (17 Vict. c. 2), to a company incorporated by the name of "*The New York, Newfoundland, and London Telegraph Company.*"

By a subsequent Act of the Legislature of *Newfoundland* (20 Vict. c. 1), the *New York, Newfoundland, and London Telegraph Company* were authorized to effect a consolidation of that company with the *Atlantic Telegraph Company, Limited,* on such terms and under such corporate name as might be agreed upon between the companies; and upon such consolidation the consolidated company were to have all the rights which the *New York, Newfoundland, and London Telegraph Company* had under its charter or acts of incorporation.

The Respondents claim on the ground that the *New York, Newfoundland, and London Telegraph Company* has been consolidated with them. One ground of appeal was that the consolidation was not shewn to have been duly effected. During the argument this was disposed of. It is not now necessary to say more on this point than that, in the opinion of their Lordships, the Respondent company has the same rights as the *New York, Newfoundland, and London Company* would, but for the consolidation, have had.

The injunction granted prevents the Appellants from using, for the purpose of telegraphic communication, either the dry land of the island of *Newfoundland*, or a cable already moored to a buoy in a portion of *Conception Bay*, where the soil is permanently under water, and which buoy was more than three miles from the dry land which forms the shore of the bay. More will be said afterwards as to the local situation and configuration of this bay. According to the argument of the Respondents and the judgment of the Court below, this portion of that bay is as much part of the island as if it were dry land. The injunction is not confined to prohibiting telegraphic communication conveying messages to or from persons in *Newfoundland* itself to places out of *Newfoundland*, but extends and is meant to extend to prohibiting the Appellant company from using any portion of the island, or the cable already moored in the spot in the bay which is treated as part of the island, for the purpose of telegraphic communication between two termini that are wholly out of the island, though the message is not repeated within the island; so that two main questions are raised:—

First: Whether the rights vested in the Respondents by the Legislature of *Newfoundland* are such as to entitle them to an injunction preventing any other person from laying a telegraphic wire across a portion of the island of *Newfoundland* between two termini out of the island, and then using that wire for the conveyance of messages from the one terminus to the other, so that the magnetic current passes through a portion of wire laid in the island, though no messages are delivered thereby in *Newfoundland*, and the messages sent across it from the one foreign terminus to the other are not repeated in the island. This is what the Appellants wish to do. As it was expressed during the argument, they wish to use the island as a stepping stone to facilitate telegraphic communication between *Ireland* and *America*.

The second question, which does not arise unless the first is decided in favour of the Respondents, is whether they are entitled to an injunction to prevent the use of the spot in *Conception Bay*, to the same extent as if it were a spot on the dry land of the island of *Newfoundland*.

Some minor points were raised on the argument which will be mentioned hereafter, but it is convenient to dispose of these two main points before dealing with any others.

The first question as to the extent of the rights given on what is not disputed to be the island depends entirely on the construction of the Act of the Legislature of *Newfoundland* (17 Vict. c. 1), for there can be no doubt that the Legislature had full power to grant such a right as is claimed, and what has to be determined is whether an intention to grant such a right is sufficiently expressed in the Act.

The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used, and the object in view.

It was said in the argument that inasmuch as the Act gave the Respondents a monopoly, and infringed on the rights of the subject, it ought to be construed strictly. This is true, but that maxim is explained very well by *Bramwell*, B., in *Foley* v. *Fletcher* (1).

In the present case the promoters of the Act had in view the making of a telegraph communication between *America* and *Europe* by way of *Newfoundland.* The use of *Newfoundland* for this purpose would give them the benefit of laying one submarine cable from *Ireland* to *Newfoundland*, and another from *Newfoundland* across *Prince Edward Island,* or otherwise, to the continent of *America.* These two lines of submarine cable would each of them be shorter than a cable by any line avoiding the territory of *Newfoundland;* and it was reasonable to suppose that the cable might with less difficulty be laid for a short distance than for a long one. When the cables were laid down and connected, a message might be transmitted direct from the terminus in *Europe* to that in *America,* using the portion of the wire in *Newfoundland* merely as a vehicle for transmitting the galvanic current as the submarine portion of the wire does; but it might also be transmitted to *Newfoundland,* and there be repeated and sent on afresh to *America,* with less expenditure of electro-motive power than would be required for the transmission of the message the whole way at once.

It was suggested in the argument that at the time when this Act was passed it was supposed that a message could not be sent the whole way, and that a repetition at *Newfoundland* would be absolutely necessary. If such a supposition was entertained it

(1) 3 H. & N. 769, 781.

was an erroneous one; and certainly there is nothing in the language of the Act to shew that the Legislature expected or required that messages should be repeated within their territory, which would not, in fact, be any benefit to *Newfoundland*. The laying down of the cables would, however, facilitate the sending of messages from *Newfoundland* to *Europe* and *America* respectively, which would be a benefit to the island.

The promoters of this enterprise come to the Legislature, who agree to empower them to use the territory, on terms supposed to be beneficial to the island, and in order to encourage them to execute their scheme grant some privileges to the company. The scheme of the promoters made it necessary to use part of the territory of *Newfoundland*, where its Legislature could grant a monopoly and put upon others any restrictions which the Legislature pleased; and also to make use of places out of the territory, such as *Ireland*, the bed of the ocean, and the land of *America*, where the Legislature of *Newfoundland* could grant no monopoly and impose no restrictions on others.

Such being the general object, let us examine the language of the Act to see what intention is expressed.

It begins by a preamble: "Whereas it is deemed advisable to establish a line of telegraphic communication between *America* and *Europe* by way of *Newfoundland*."

It then incorporates the promoters, and by sect. 6 requires the company to form certain lines in *Newfoundland*, and enables, but does not require, them to form any other lines from any point in *Newfoundland* to any other point in *Newfoundland* "or elsewhere." These lines would be for the benefit of the Island of *Newfoundland*, as they would carry messages in the island, and from the island to and from places elsewhere; and this seems to be the main consideration from the promoters to *Newfoundland* for the privileges afterwards conferred on them. The making of those lines would also facilitate the main scheme of the promoters by enabling them to convey messages from *America* to *Europe*, either by a direct message or by repeating it, but in neither way would that confer any benefit on the island.

Sect. 8 enacts that the Governments of *Great Britain*, of the *United States*, and of *Newfoundland* shall respectively, at all times, have a preference over all persons of conveying messages upon the said lines of telegraph relating to the public service of those Governments respectively. The Legislature of *Newfoundland* must have contemplated that the Governments of *Great Britain* and the *United States* would send messages to and from *Europe*, from and to *America*, using the island merely as a stepping stone, and this obligation to give priority is imposed on the company without any reference to whether these messages were repeated in the island, or the line within their territory was used merely as a means of conveying the electric current from *Europe* to *America*. The 13th section frees from duty all materials, and this again applies equally to materials for lines made for communication within the island, and for lines used merely as means of transit for termini outside the island.

Then comes sect. 14, on the construction of which this point mainly depends. The earlier part of the section gives in affirmative words to the company a monopoly for fifty years between any points in the island. If the Act had stopped there a rival company might have made and worked a communication from *Newfoundland* to the Continent of *America* in the very way mentioned in the proviso at the end of the section.

The prohibition which immediately follows is more extensive. It is that no other person shall during the fifty years be permitted to make any lines on the island, "or to extend to, enter upon, or touch any part of this island or the coast thereof, or of the islands and places within the jurisdiction of the Government of this colony with any telegraphic cable, wire, or other means of telegraphic communication from any other island, country, or place whatsoever." This must have been intended for the benefit of the company, and was necessary to protect them in a monopoly of the traffic from *America* on the lines which, by the proviso, they must make in the five years as a condition to their monopoly. The words in their literal and grammatical sense include a touching on the island for telegraphic communication across the island, or part of it, from a terminus outside the territory to a terminus outside the territory. If the sole object of the Legislature had appeared to be to encourage the making of lines of telegraph for the benefit of the people of the territory, there would have been force in the argument that those large and general words were to be cut down by interpolating at the end some such phrase as "for the purpose of communicating with the island," so as to make the restriction no more extensive than the object. Whether we should have been justified in making such an interpolation it is not necessary to decide, for the intention of the Legislature was to encourage a company whose main object was, as is recited, to make a telegraphic communication between *America* and *Europe* by way of *Newfoundland*, for which purpose they must use the territory of this colony. In order to obtain power to do so they consent to be bound to make internal lines of telegraphic communication. The words used, taken in their literal sense, impose a restriction which would be for the benefit of the company if they should make the communication from *America* to *Europe* by way of *Newfoundland*, and which is not more extensive than was requisite to encourage a company for the first time to make such a communication without the danger of others using the island as a stepping stone as soon as it has been shewn to be practicable.

No doubt this might have been more artificially expressed. Had the affirmative terms in which the monopoly is granted been so worded as expressly to include telegraphic communication to or from foreign termini across the island, there would have been no room for argument. They are not so worded, and consequently different minds may put a different construction on the subsequent prohibitive words; but, on the whole, their Lordships think that the intention of the Legislature was, for the benefit of the company, to prohibit the use of any part of the territory of *Newfoundland* by any other person for telegraphic communication, whether within the island, or as a mere means of transit between places outside the territory.

Before proceeding to discuss the second question, it is desirable to state the facts which raise it.

Conception Bay lies on the eastern side of *Newfoundland*, between two promontories, the southern ending at *Cape St. Francis*, and the northern promontory at *Split Point*. No evidence has been given, nor was any required, as to the configuration and dimensions of the bay, as that was a matter of which the Court could take judicial notice.

On inspection of the Admiralty chart, the following statement, though not precisely accurate, seems to their Lordships sufficiently so to enable them to decide the question:—

The bay is a well-marked bay, the distance from the head of the bay to *Cape St. Francis* being about forty miles, and the distance from the head of the bay to *Split Point* being about fifty miles. The average width of the bay is about fifteen miles, but the distance from *Cape St. Francis* to *Split Point* is rather more than twenty miles.

The Appellants have brought and laid a telegraph cable to a buoy more than thirty miles within this bay. The buoy is more than three miles from the shore of the bay, and in laying the cable, care has been taken not at any point to come within three miles of the shore, so as to avoid raising any question as to the territorial dominion over the ocean within three miles of the shore. Their Lordships therefore are not called upon to express any opinion on the questions which were recently so much discussed in the case of *Reg.* v. *Keyn* (the *Franconia* case).

The question raised in this case, and to which their Lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of *Conception Bay* above described.

The few English common law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of *England*, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore.

The earliest authority on the subject is to be found in the grand abridgment of *Fitzherbert* "Corone," 399, whence it appears that in the 8 Edw. 2, in a case in Chancery (the nature and subject-matter of which does not appear), *Staunton*, J., expressed an opinion on the subject. There are one or two words in the common printed edition of *Fitzherbert* which it is not easy to

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decipher or translate, but subject to that remark this is a translation of the passage: "*Nota per Staunton*, J., that that is not [sañce which Lord *Coke* translates 'part'] of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered], that in such a place the country can have conusance, &c."

That is by no means definite, but it is clear *Staunton* thought some portions of the sea might be in a county, and within the jurisdiction of the jury of that county, and at that early time, before cannon were in use, he can have had in his mind no reference to cannon shot.

Lord *Coke* recognises this authority, 4th Institute, 140, and so does Lord *Hale*. The latter, in his treatise, *De Jure Maris*, p. 1, c. 4, uses this language: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discerne between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. Edward II., Corone, 399."

Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that eye-witnesses on shore could say who was to blame in a fray on the waters resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manœuvres, it would be very much more extensive; in either sense it is indefinite. But in *Reg.* v. *Cunningham* (1) it did become necessary to determine whether a particular spot in the *Bristol Channel*, on which three foreigners on board a foreign ship had committed a crime, was within the county of *Glamorgan*, the indictment having, whether necessarily or not, charged the offence as having been committed in that county.

The *Bristol Channel*, it is to be remembered, is an arm of the sea dividing *England* from *Wales*. Into the upper end of this arm

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(1) Bell's Cr. C. 86.

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of the sea the River *Severn* flows. Then the arm of the sea lies between *Somersetshire* and *Glamorganshire*, and afterwards between *Devonshire* and the counties of *Glamorgan, Carmarthen,* and *Pembroke.* It widens as it descends, and between *Port Eynon Head*, the lowest point of *Glamorganshire,* and the opposite shore of *Devon* it is wider than *Conception Bay;* between *Hartland Point,* in *Devonshire,* and *Pembrokeshire* it is much wider. The case reserved was carefully prepared. It describes the spot where the crime was committed as being in the *Bristol Channel,* between the *Glamorganshire* and *Somersetshire* coasts, and about ten miles or more from that of *Somerset.* It negatived the spot being in the River *Severn,* the mouth of which, it is stated, was proved to be at *King's Road,* higher up the Channel, and was to be taken as the finding of the jury. It also shewed that the spot in question was outside *Penarth Head,* and could not therefore be treated as within the smaller bay formed by *Penarth Head* and *Lavernock Point.* And it set out what evidence was given to prove that the spot had been treated as part of the county of *Glamorgan,* and the question was stated to be whether the prisoners were properly convicted of an offence within the county of *Glamorgan.* The case was much considered, being twice argued, and Chief Justice *Cockburn* delivered judgment, saying: "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed, forms part of the body of the county of *Glamorgan,* and we are of opinion that it does. The sea in question is part of the *Bristol Channel,* both shores of which form part of *England* and *Wales,* of the county of *Somerset* on the one side and the county of *Glamorgan* on the other. We are of opinion that looking at the local situation of this sea it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the *Holms* between which and the shore of the county of *Glamorgan* the place in question is situated, having always been treated as part of the parish of *Cardiff,* and as part of the county of *Glamorgan,* is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of *Somerset* and *Glamorgan,* is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of *Glamorgan*." The case reserved in *Cunningham's Case*, incidentally states that it was about ninety miles from *Penarth Roads* (where the crime was committed) to the mouth of the Channel, which points to the headlands in *Pembroke* and *Hartland Point* in *Devonshire*, as being the fauces of that arm of the sea. It was not, however, necessary for the decision of *Cunningham's Case* to determine what was the entrance of the *Bristol Channel*, further than that it was below the place where the crime was committed, and though the language used in the judgment is such as to shew that the impression of the Court was that at least the whole of that part of the Channel between the counties of *Somerset* and *Glamorgan* was within those counties perhaps that was not determined. But this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of *Glamorgan*, and consequently, in every sense of the words within the territory of *Great Britain*. It also shews that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord *Hale's* opinion, as he says not that a bay is part of the county, but only that it may be.

Passing from the Common Law of *England* to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude *Conception Bay* from the territory of *Newfoundland*, but also would have excluded from the territory of *Great Britain* that part of the *Bristol Channel* which in *Reg.* v. *Cunningham* (1) was decided to be in the county of *Glamorgan*. On the other hand, the diplomatists of the *United States* in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor *Kent*, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by *Great Britain*, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of *Newfoundland*.

To establish this proposition it is not necessary to go further back than to the 59 Geo. 3, c. 38, passed in 1819, now nearly sixty years ago.

There was a Convention made in 1818 between the *United States* and *Great Britain* relating to the fisheries of *Labrador, Newfoundland*, and His Majesty's other possessions in *North America*, by which it was agreed that the fishermen of the *United States* should have the right to fish on part of the coasts (not including the part of the island of *Newfoundland* on which *Conception Bay* lies), and should not enter any "bays" in any part of the coast except for the purposes of shelter and repairing damages, and purchasing wood, and obtaining water, and no other purposes whatever. It seems impossible to doubt that this Convention applied to all bays, whether large or small, on that coast, and consequently to *Conception Bay*. It is true that the Convention would only bind the two nations who were parties to it, and consequently that, though a strong assertion of ownership on the part of *Great Britain*, acquiesced in by so powerful a state as the *United States*, the Convention, though weighty, is not decisive. But the Act already referred to, 59 Geo. 3, c. 38, though passed chiefly for the purpose of giving effect to the Convention of 1818, goes further.

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(1) Bell's Cr. C. 72.

It enacts not merely that subjects of the *United States* shall observe the restrictions agreed on by the Convention, but that all persons, not being natural-born subjects of the King of *Great Britain* shall observe them under penalties. And in particular, by sect. 4, it enacts that if "any person" upon being required by the governor, or any officer acting under such governor, in the execution of any order or instructions from His Majesty in Council, shall *inter alia* refuse to depart from such bays, he shall be subject to a penalty of £200.

No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, *Conception Bay* is in every sense of the words a bay within *Newfoundland*, though of considerable width; and as there is nothing to justify a construction of the Act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British Legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to shew that this bay is by prescription part of the exclusive territory of *Great Britain*. As already observed, in a British tribunal it is decisive.

By the treaty of *Washington* it was agreed by the 32nd article that certain provisions should extend to "the colony of *Newfoundland* so far as they are applicable. But if the Imperial Parliament, the Legislature of *Newfoundland*, or the Congress of the *United States* should not embrace *Newfoundland* in their laws for carrying the foregoing articles into effect, then this article shall be of no effect."

The Act 35 & 36 Vict. c. 45, of the Imperial Legislature, suspended all Acts of Parliament which operated to prevent the carrying the articles into effect, and by sect. 2 enacted that so soon as the necessary laws had been passed by the Legislature of *Newfoundland* that Act should extend to *Newfoundland*.

The Act 59 Geo. 3, c. 38, is one of the Acts which would operate to prevent the carrying of articles into effect. In the opinion of their Lordships the above treaty and Act are sufficient to shew that, in the opinion both of the executive and of the Legislature, the right to legislate over the bays of *Newfoundland*, to which that Act applied, of which *Conception Bay* is one, had been conferred on the Legislature of *Newfoundland*.

There remain two minor points to be disposed of.

It was argued that the terms of the Act of the Legislature of *Newfoundland* might enable the Attorney-General to obtain such an injunction as this, but that the Respondents, private persons, could not. To this it is a sufficient answer that, in the opinion of their Lordships already expressed, the Legislature, though they might have expressed their meaning more artificially, have sufficiently shewn that their intention was to impose the restrictions in order to protect the rights granted to the *Newfoundland Company*, which the Respondents represent.

The other was that, so far as the use of the cable in the bay was concerned, it was not shewn that the Respondents would sustain any damage, or, at least, any damage of sufficient extent to justify the interference of a Court of Equity. The injunction, however, is only till the hearing, and as no explanation has been given as to any other object for which the cable is brought into the bay, unless it be for the purpose of competing with the Respondents by the use of this portion of the territory of *Newfoundland*, this is enough to justify the interim injunction.

Nothing now said is intended to prejudge, either one way or the other, any defence on this last point which may be raised on evidence or at the hearing.

Their Lordships, therefore will humbly recommend to Her Majesty that the order of the Supreme Court of *Newfoundland* be affirmed and that this appeal be dismissed with costs.

Solicitors for Appellants: *Johnson, Upton, & Budd.*

Solicitors for Respondents: *Bircham & Co.*

[HOUSE OF LORDS.]

WILLIAM CLARK . . . . APPELLANT; H. L. (E.)

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PATRICK ADIE . . . . RESPONDENT. *April* 27, 30.

(No. 2, see *ante*, p. 315.)

Patent—Licensee—Foreign Specifications—Evidence—"Parallel."

A licensee under a patent cannot, in any way, question its validity during the continuance of his license. But he may shew that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it.

Per LORD BLACKBURN:—A licensee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to shew that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right:—

Semble, that in an action on a patent, where such an issue has been raised, evidence of the existence of foreign specifications of an earlier date, preserved in and obtained from the Patent Office, might be admissible.

Observations on this matter.

The words used in a patent must be construed, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found.

In this case the word "parallel" was construed in its popular and not its purely mathematical sense.

THIS was an appeal against an order made in the Court of Appeal on the 18th of July, 1876, by which a previous order of Vice-Chancellor *Bacon*, made on the 12th of April, 1876, was reversed, and by which a claim of *Adie* to surcharge *Clark* on account of certain royalties for works done as a licensee under a patent, was declared to be established.

In this case *Clark* was the licensee of *Adie* under a patent dated in October, 1866, taken out by the latter for improvements in the construction of a machine for clipping horses and shearing sheep and cattle. The patent was taken out in 1866, but was amended in 1870 by a disclaimer.

In July, 1871, *Clark* wrote to *Adie*, agreeing to take a license for the manufacture of horse-clippers under *Adie's* amended patent,

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and to pay 1*s.* 2*d.* for every horse-clipper sold. The offer was accepted "during the validity of my patent." Differences afterwards arose between the parties, and *Clark* insisted that the clippers he made were in fact made according to the descriptions in his own and in *Grayson's* patents, and were not made under the patent of *Adie,* and consequently were not infringements of that patent. Vice-Chancellor *Bacon* made an order disallowing the surcharge. On appeal that order was reversed and the surcharge was allowed. At the hearing on the appeal, *Clark* contended that *Adie's* invention was, under the terms of his specification, founded on the making of the teeth of the comb plates "parallel," and on the use of an extra third plate for increasing the depth of the hair left on the animal, and that as neither of these things was found in the clippers manufactured by him, he had not made himself liable for royalties for the use of the patent. In support of his contention he proposed also to shew by evidence of certain American specifications which existed in the books of the library of the Patent Office previous to the date of *Adie's* patent, that what he did had been known before *Adie's* patent was obtained.

The Lords Justices heard the evidence *de bene esse*, expressed an opinion that it did not affect the case, and then declared that it was not properly admissible "for the purpose of construing the specification of the particular patent before us."(1)

The Appellant not only denied the fact of any infringement colorably or otherwise, but he contended first, that he was not, as licensee or otherwise, estopped from shewing the extent and limits of the real nature of the invention which was the subject of *Adie's* patent; and, secondly, that the evidence he had tendered was properly admissible for the purpose of construing *Adie's* specification, and of shewing that, in machines known previously to the date of *Adie's* patent, some improvements which *Adie* claimed had been in fact applied, and so were known, and that the use of that knowledge was permissible to any one.

The Respondent affirmed that there had been on the part of the Appellant the use of the processes described in his specification, and consequently that the Appellant had thereby rendered himself liable to the surcharge claimed, and that it was not competent to a licensee to dispute, in any way, the validity of his licensor's

(1) L. R. 3 Ch. D. 134.

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patent, and that for that reason the American specifications were not admissible in evidence—and farther, that though those specifications were in the library of the Patent Office, there had not been any such publication of them as would affect any patent subsequently taken out in this country, even if the processes in those specifications could be shewn to resemble the processes set forth in that subsequent patent; and thirdly, it was denied that they did so.

Sir *H. Giffard*, S.G., Mr. *E. Kay*, Q.C., Mr. *Aston*, Q.C., and Mr. *Everitt*, appeared for the Appellant:—

Trotman v. *Wood* (1), *Seed* v. *Higgins* (2), *Harmar* v. *Playne* (3), *Lewis* v. *Marling* (4), *Fisher* v. *Dewick* (5), and *Betts* v. *Neilson* (6), were referred to.

Sir *J. Holker*, A.G., Sir *H. M. Jackson*, Q.C., and Mr. *Lawson*, appeared for the Respondent, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*):—

The argument to which your Lordships listened with great care and attention on Friday last on this appeal, has not, I think, raised any doubt in any of your Lordships' minds as to the propriety of the decision of the Court below, and I am prepared to submit to your Lordships that the appeal in this case ought to be dismissed.

The Appellant is a licensee, who has taken a license to work a patent granted to the Respondent, Mr. *Adie*, a patent which is dated the 30th of October, 1866, and which subsequently became subject to a disclaimer and memorandum of alteration by Mr. *Adie* on the 10th of August, 1870. Therefore, as between the Appellant, the licensee, and the Respondent *Adie* the patentee, (whatever strangers might have to say as to the validity of this patent,) the question of validity must be taken as that which the Appellant is unable to dispute. So far as he is concerned he must stand here admitting the novelty of the invention, admitting its utility, and

(1) 16 C. B. 496.
(2) 8 H. L. C. 550.
(3) 11 East, 101.
(4) 10 B. & C. 22.
(5) 4 Bing. N. C. 706.
(6) Law Rep. 3 Ch. Ap. 429.

6 Jur NS/1264

admitting the sufficiency of its specification; but, on the other hand, he is of course entitled to have it ascertained what is the ambit, what is the field, which is covered by the specification as properly construed; and he is entitled to say: Inside of that field I have not come; so far as I have worked I have worked outside the limit which is covered by it, as properly construed, and therefore I am not bound to make any of those payments which are stipulated in my license as payments to be made for working the patent. In this respect the Appellant, the licensee, stands here upon the same issue as would arise between a patentee and an alleged infringer upon the question of the fact of infringement. The question which your Lordships have to consider is the same which in an ordinary action for an infringement of a patent you would have to determine upon that one particular issue going to the fact of infringement, and assuming all the other issues, which ordinarily are raised upon a patent action, to be found for the Plaintiff.

Now, my Lords, that being the condition of the argument as regards the Appellant, the question which arises is, whether by the manufacture of two particular clipping machines, or clipping instruments, which are exhibits in the cause, he has come within the terms of the license which he has taken. [His Lordship here took up two of the machines exhibited to the House and described them, and proceeded:—]

The two particulars in which *Clark's* manufacture is said to differ from that of the patentee are these: it is said, in the first place, that the teeth of the comb of the clipping instrument made under the letters-patent are teeth which should be exactly mathematically parallel, and that the top or end of the teeth should be square, and it is said that the instrument manufactured by the Appellant has the teeth not so parallel, and that they are pointed instead of being made in that square-topped manner in which the patent provides that its manufacture should be made. The other point in which it is said that the manufacture of the licensee differs from that of the patentee is this: it is said that in the patent article a provision was made according to the specification, that an additional plate should be put on the lower part of the comb for the purpose of raising the comb from the skin of the animal to be clipped, and in that way regulating the length at which the hair of the animal should be clipped; and it is said that in the manufacture of the Appellant there is no provision for varying in that way the length at which the hair should be clipped.

Now, my Lords, for the purpose of seeing how far in those respects the manufacture of the Appellant takes him out of the terms of the patent, it is necessary to turn to the specification of the patent, and I turn to the specification as altered by the disclaimer and memorandum of alteration. In the first place I will consider the question as to what was called in the argument the parallelism of the teeth. My Lords, the only sentence of the specification which, in speaking of the teeth, uses the term "parallel" is this "F, one side of A, made either straight or curved, being cut into teeth pointed like a comb in the parallel portions." This is the material part of the sentence, and the question is, does that represent as one essential part of the invention that there shall be a parallelism in the teeth, and that that parallelism is a peculiar merit of the invention claimed by the patentee?

I do not for the present look at the drawing, but I dwell merely upon the words that I have read, and, reading these words, it appears to me that it would be impossible as a matter of construction to say that this patentee has claimed, or that he would claim, a parallelism of the teeth. It is quite true that he uses the word "parallel," but he explains in the clearest way that he used it in a popular and not in the mathematical sense. He is referring for his analogy or similitude to a comb, and he is taking notice that in every comb the teeth may be said to be parallel, and undoubtedly they are in a popular sense parallel, although probably, mathematically speaking, it would be difficult to find that the teeth of a comb were always, or generally, mathematically parallel. But he goes farther, and he takes notice that the teeth are to be pointed teeth, and they are to be pointed like the teeth of a comb, and he uses the expression "in the parallel portions." He uses these words at the same time that he declares that the teeth are to be pointed teeth, as the teeth of a comb are pointed. Now, when we remember that it would be impossible that where you had teeth

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tapering to a point the teeth could at one and the same time taper to a point and be mathematically parallel, it becomes perfectly obvious that what he is speaking of as the portions of the teeth which he calls "the parallel portions" are the upper portions of the teeth nearer the points, as distinguished from the part where the teeth spring in the first instance from the body of the comb, and where at the point of springing from the comb, they are naturally in a more angular position towards each other. It is for this purpose, and for this purpose only, that he is introducing the word "parallel." And then, when I turn with that explanation to the exhibit of that which is made by the Appellant, the licensee, I find that his exhibit comes up exactly to the description which is contained in this specification. At the point where the teeth spring from the body, or solid part of the comb, the teeth are towards each other angular, but after they pass for about one third of the way up to the point, they become, in popular language and to the eye, parallel. Although it may possibly be that upon a strict mathematical examination some divergence from absolute parallelism might be detected, still, popularly speaking, and to the eye, they are perfectly parallel at the upper two-thirds of the teeth.

Well, my Lords, when I turn to the drawing, the drawing shews the teeth of the comb only so far as those teeth project beyond the cutting teeth which cover them, and, so far as they there project, that is to say for a very short way from the points upwards, undoubtedly in the drawing, the points are represented as parallel to each other, and in the drawing they could not have been very well represented in any other way but as parallel. It is also true that it is very difficult to say whether in the drawing the teeth are meant to have points exactly acute, or square points. I should say they were rather intended to have square points, but it is not anywhere said in the specification that square points are a part of the invention, or that it is the desire of the patentee that the points should be square; on the contrary, he states in the specification that they are to be pointed like a comb, and a comb with square points is what probably no person ever yet saw.

So far, therefore, as regards the parallelism, I do not find that

Mr. *Adie* has claimed in any way an exact and mathematical parallelism as a merit of his invention. He has used the term "parallel" no doubt, but he has used it merely in its popular sense, to describe by the similitude of a comb that these teeth are not to incline to each other at any angle used for the purpose of producing an inclination. The case, as regards the parallelism, will, I think, be judged of, and ought to be judged of, as I said before, as if this had been a proceeding against an infringer. It appears to me that it would be utterly impossible, assuming this to be a valid patent, and the proceedings to be taken against an alleged infringer for manufacturing an instrument such as I hold in my hand, that that infringer could be allowed to say,—I have not infringed the patent, because by the application of a minute and mathematical test it will be found that there is not an exact and complete parallelism at the upper part of these teeth near the points.

The other question seems to me to be even more simple than this. The part of the specification which relates to the additional plate is that which it is necessary to consider. It is in these words: "The short end of the lever works in a slot in B, and by moving the handles H H to and from each other, lateral motion is given to the plates A and B and to the cutters, which cut both ways, clip all that comes between them, the thickness being regulated by the thickness of A" (that is the body of the comb) "or increased when desired by an extra comb E fixed on underneath," and, as I said, the Appellant alleges that he has not fixed on any extra comb, and therefore has not worked under this patent. But, my Lords, that is at once answered by observing that what is here spoken of is in the alternative. There are two things which may be done—you may work the patent by making an instrument having a fixed degree of thickness, a fixed point at which the hair is to be cut, if that is the course you prefer. If that suits the business which you have in hand, you accomplish it by making the comb A of the thickness which you desire. But there is another course which you may take. You may desire to increase the length at which the hair is to be cut, and if you so desire you are then to put on an extra comb E. But the one alternative is a subject of the patent just as much as the other. It nowhere says that the instrument must be an instrument which is to be worked in either or both ways. It may suit the business of one man to work it without variation; it may suit the business of another man to work it with variation; and I ask, if it be the case that the person working it does not, to use the words of the specification, desire to increase the thickness, what is he to do? My Lords, he is clearly in that case to work without the extra comb in the method in which the Appellant, the licensee, has worked. Therefore, again using the test of an action against an infringer, it would be impossible to imagine that an infringer, who in other respects had followed the manufacture pointed out in the specification, could exempt himself from liability by saying, I did not desire to increase the thickness, and I did not increase the thickness by the use of any extra comb.

Therefore, my Lords, upon the two points of difference I am obliged to find, without any kind of hesitation, that there is nothing whatever in what is suggested which constitutes that which will deliver the licensee from the charge of having worked under, and according to, the patent.

My Lords, a point was raised in the course of the argument, which occupied some time in the discussion—as to whether certain evidence ought or ought not to be admitted in this case. That evidence was of this kind: there had been previous patents granted to different persons for the purpose of making horse-clippers of various kinds, and the present patent being a patent for "improvements in the machinery for clipping horses," it was said that those prior patents ought to be admitted in evidence for the purpose of shewing the state of the manufacture before the present patent was granted, and that, they being so admitted, your Lordships would find in them descriptions of machines which were identical, or all but identical, as to the formation of the teeth, with that machine which the Appellant, the licensee, was using. And then it was said, if that is so, the present patent claiming machinery which would be covered by former patents, would be invalid, and you ought to put upon this specification the construction, if it is possible so to do, which would deliver it from the peril of being held invalid by reason of the prior specifications. My Lords, the Lords Justices heard the evidence upon the subject *de bene* *esse*, and ultimately they expressed an opinion that it could not be received for the purpose for which it was intended; but they said, as I read their judgment, that having looked at the evidence, that evidence would not affect the conclusion at which they arrived, and in point of fact the evidence appears, so far as I understand it, to be entered in the decree.

I do not think it will be necessary for your Lordships to lay down any precise rule as to the reception or the rejection of evidence in this case. It appears to me that it would be quite open in a case of this kind for a person in the position of a licensee, or for a person in the position of a patentee, to refer, in launching his case, to the state of manufacture up to and at the time when the patent was granted. He might give evidence of that in any usual way—in any way suitable for the purpose. I should myself doubt whether the mere reproduction of prior specifications from the records of the Patent Office would be the best way of shewing what was the state of the manufacture at the time, for it might well be that there were in the Patent Office specifications which had been allowed to slumber, which had been utterly unused, which had never been adopted or taken into the course of manufacture, and which practically had exercised no influence whatever upon the manufacture of the particular article. But my Lords, I am not prepared to say that in some way, and for some purpose, these specifications might not have been put into the hands of those acquainted with the trade, and questions have been asked upon them; nor am I prepared to say that they might not for some purposes have been admissible in evidence, and if admissible in evidence for some purpose, of course they would become evidence, whatever the weight and effect of that evidence might be in the cause.

My Lords, it is sufficient for this purpose to say that, having attentively considered the parts of those specifications which it was suggested to your Lordships had a bearing upon this case, I have arrived at the conclusion that they are not of any weight to control what appears to me to be the necessary and legitimate construction of the particular specification which your Lordships have to consider. It was said that if the specification before the House was ambiguous or doubtful, a construction might be put upon it which would save this specification from invalidity by reason of prior publication. My Lords, it is unnecessary to consider that argument, for the specification appears to me not to be doubtful or ambiguous. What the consequence might be in any litigation with an outsider, with one of the public, it is not for your Lordships now to consider; but having to construe the specification upon the two particular points which have been mentioned, I am bound to say that I arrive without hesitation at the conclusion that there is nothing in the specification which rests the merit of the invention upon a parallelism of the teeth of the comb, and there is nothing on the proper construction of the specification which enables either a licensee or an infringer to say that provided he does not use the extra comb which is spoken of, he does not use and he does not infringe the patent.

My Lords, upon those grounds I submit to your Lordships, and move your Lordships, that the appeal should be dismissed with costs.

LORD HATHERLEY had come to the same conclusion, without any hesitation, for it appeared to him, when the two machines were examined, that the Appellant in the present case was really driven to rest his case upon narrowing the effect of *Adie's* patent to such an extent as to enable him to say in substance that he had not worked under it. The licensee could not deny the validity of the patent, but he might shew that what he had done did not come within its terms. With regard to the parallelism, his Lordship read the patent as the Lord Chancellor had read it. And he read in the same manner that part of the patent which related to the additional thickness of plate required to regulate the length of the hair to be cut. His Lordship continued:—

When we come to the claim of the patentee, supposing him to be placed in the position of having to satisfy a Court that he has not claimed too much, when it comes to be proved that other patents have been taken out which might more or less cover some of those inventions which he has claimed, then he says: "I would have it understood that I do not confine myself to the precise details shewn and described." The argument here has endeavoured to confine him very strictly indeed to that claim, but he says they

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"may be varied." He says, "What I do claim is the application of a number of small shears clipping hair to any required length"—that is one thing—"the protection afforded by means of the comb points in front"—that is the next thing—"and the guidance given to the hair by means of said comb points." It is perfectly impossible, as it seems to me, in a common sense construction of these words, to say that he has limited his claim to the parallel portions of the comb, and to the placing of an additional block in order to vary the thickness of the hair which might have to be cut. As was observed by one of your Lordships, certainly, whatever may be thought of the length to which *Foxwell* v. *Bostock* (1) has gone, it would have been a singular argument indeed for a patentee to use, and it is one as to which it is strange that it should never have occurred to anybody to use it, if it could have been used, to say: The mode in which a patent of this description is now construed by me is this: when you find it is a construction for an improvement of a machine, then look to all the other machines which have been constructed for this purpose,—take out of the apparent largeness and generality of this claim all those inventions and improvements which have been anticipated by the other letters-patent which I produce and shew in evidence—hold, on my behalf, that I must have known all these prior inventions, and that therefore it is most preposterous to suppose that I can be claiming them,—I ask the Court therefore to cast out of its purview all that had previously been invented, and to leave me in possession of the residuum as that on which I can be held to insist against an infringer. Whatever may be the length to which the principle on which *Foxwell* v. *Bostock* (1) was decided has been carried, it seems to me that it would be a very extraordinary construction of letters-patent to say that the Court would take care to steer a patentee clear of all those rocks which are ahead of patentees in consequence of previous inventions, by the simple assumption that it was impossible that he could mean to claim those things which had been already invented, and therefore you must reduce his claim to a minimum as long as you find anything to reduce it to—you must reduce it to those things which had never been invented before, and so hold, on the construction of the present patent, that you have reduced it to the parallelism and the substitution of the additional blocks for the purpose of cutting hair at different lengths. It appears to me to be perfectly plain that we must construe these letters-patent in a simple way, as the patentee has chosen to explain them for himself in framing his claim. He has told you what he claims, namely, those things which I have read. It seems to me that you cannot confine the claim to that which the licensee, because it suits his purpose, wishes to confine it to, any more than you could have done that in the case of an infringer if this had been an ordinary action for infringement.

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(1) 12 W. R. 723; 4 De G. J. & S. 298.

I will say little or nothing about the introduction of the evidence. There are several points of view, no doubt, in which the production of those patents as evidence may possibly have been correct, because this being a patent for an improvement, I take it that it was open to both the Plaintiff and the Defendant in an action of this kind to lead the Court up to what the improvements were, by putting the Court in possession of what the previous inventions were, upon which this was said to be an improvement. I have no doubt that that would be one legitimate use of the evidence, as it would also be a legitimate use of it to shew, by other letters patent or the like, what the exact terms of art were which were employed in describing the machine in question. The evidence having been admitted for a legitimate purpose, it would be perfectly legitimate to let it remain on the record, but as regards the question whether that evidence could be used in the manner in which it has been pressed upon us in argument, namely, as shewing, step by step, that first one portion of what this patentee seems to me to have claimed, is to be rejected because it was invented by somebody else before him, and then that another portion of what he claims is to be rejected because it was invented by another person before him, and that therefore it is legitimate to use such evidence in construing language, which is in itself plain, for the purpose of shewing that it could not possibly have that which is its ordinary and primary meaning, because if it had that effect it would leave the patentee subject to the destruction of his patent: I apprehend, my Lords, that it would be very doubtful indeed whether it is evidence which could be pressed as being useful for such a purpose.

But it is not necessary to go farther upon that point, because I hold that from the language of this patent it is impossible to construe it as confined to the two points referred to by the Appellant, and it is impossible so to construe it as not to leave a portion therein which strikes Mr. *Clark* as the licensee, and makes him liable for the license duty he has agreed to pay in respect to that portion under which he has worked, he being compelled by the circumstances under which he took the license, to close his mouth as to any alleged deficiencies in the patent. It is not for him to say that any part of the patent is void; he cannot do that. If the patent must be taken to be valid and effectual against him, I think he has clearly manufactured a machine within the terms of that patent in respect of which he agreed to take the license and agreed to pay a royalty, which royalty, therefore, became payable by him upon that machine.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion.

The position of a licensee who under a license is working a patent right, for which another has got a patent, is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land. When the lease is at an end, the man who was formerly the tenant, but has now ceased to be so, may shew that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot shew anything of the sort; it must be taken as against him that the lessor had a title to the land. Now a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. The two cases are very closely analogous; in analogies there are always apt to be some differences, but I know of none in this. The tenant under a lease is at liberty to shew that the parcel of land which he and the lessor are disputing about was never comprised in the lease at all; he may shew that he took the lease of *Blackacre* from the person who granted him the lease, and that the spot of land then in question, *Greenacre,* we will suppose, is a piece of land which was never included in the lease at all, and which belongs to him (the tenant) under some other right. So may a licensee under a patent shew that, although he accepted the license, and worked the patent, and the patentee could never, therefore, so long as that license was in existence, bring an action against him as an infringer, yet the particular thing which he has done was not a part of what was included in the patent at all, but that he has done it as one of the general public might have done it, and therefore is not bound to pay royalty for it. If he has used that which is in the patent, and which his license authorizes him to use without the patentee being able to claim against him for infringement, because the license would include it, then, like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty. Although a stranger might shew that the patent was as bad as any one could wish it to be, the licensee must not shew that.

Taking that to be the rule, and I think the analogy between the two is perfect, the question in a suit in which a patentee is claiming royalty from his licensee is, whether what the licensee has done is included in the patent which the patentee or licensor had, and which he gave him license to use? That must depend entirely upon the construction of the specification. If upon the true construction of the specification it is included, no matter whether it is good or bad, the licensee must pay. If, upon the true construction of the specification it is not included, there is no reason why the licensee should pay.

My Lords, that brings us to what is the point in the present case. In construing the specification, we must construe it like all written documents, taking the words and seeing what is the meaning of those words when applied to the subject-matter; and in the case of a specification which is addressed not to the world at large but to a particular class, for instance, skilled mechanicians, possessing a certain amount of knowledge, it is material for the tribunal to put itself in the position of such a class, namely, skilled mechanicians, and to see what the words of the specification mean when applied to such a subject as skilled mechanicians would

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know, and, as the tribunal has now, by the admission of evidence or otherwise, put itself in a position to understand, and then to say what the words of the specification mean when applied to such a subject-matter. For that purpose I am not at all prepared to say that the other patents and specifications would not in the present case be admissible evidence, as having more or less weight (in this case I think they would have but little weight) or value as putting the Courts in the position of knowing what was the subject-matter they were dealing with, and what the words meant, and whether they had a different construction from what they would have if construed without that knowledge. But when it is attempted, as it was certainly in the argument before us, I do not know whether the Vice-Chancellor went so far as that, to say that inasmuch as these specifications shew, or are alleged to shew, matters which, upon a fair construction of the specification claimed by the patentee, were old at the time that the patent was taken out, and were generally known to be old, therefore the specification must be so construed as not to include them; that seems to me to be both contrary, as far as I know, to the course of decision and contrary to principle. As my noble and learned friend opposite (Lord *Hatherley*) has just observed, it would afford a very simple recipe for saying that no patent should ever be upset upon the ground of want of knowledge. If, when you say you can shew that a thing was old at the time the patent was granted, you are to construe the specification as not intending to claim that, because the man who claimed it would be suicidal and foolish, it would be a recipe for saying you shall never upset a patent at all for want of knowledge. I do not think, my Lords, that that could possibly be done.

Now, my Lords, with these general remarks, I come to the present case. [His Lordship made a statement of the facts, and said:—] It seems to me, my Lords, that *Clark* has in fact used the patent whilst he had a license to use it, and that, having used it in that way, and there having been nothing analogous to an eviction, or other mode of terminating the license, he is as much bound to pay the royalty rent as a tenant, in the analogous case, would have been bound to pay the rent for the land.

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LORD GORDON concurred. As to the argument for the absolute exclusion of evidence as to prior patents, his Lordship said:—

I think it is of the more consequence in this case that your Lordships should not come to a decided opinion with reference to the exclusion of the kind of evidence which was tendered on this trial, first, because this is a case which has reference to "improvements" on means and machinery for doing a particular sort of work, as to which there is no doubt that various machines have been described and protected under previous patents; and, secondly, because in the present case, while it is the rule that a licensee is not entitled to object to the validity of the patent which is the subject of the license, still it does appear to me that there have been views expressed which might permit, and fully justify, the reception of the evidence which has been rejected. I refer to the opinion that the licensee may shew that what he has done, and in respect of which a royalty is claimed from him, is something that is really not within the limits of the patent. That makes it necessary that there should be a full opportunity of giving evidence. There should not be a rule of absolute exclusion of such evidence. There should on certain occasions be a full opportunity of giving it. Some of these cases might come before the Common Law Courts, where the Judge does not form and declare his own opinion upon the evidence itself, but states his view of its competency, leaving to the jury the decision of its value in point of fact. Subject to these observations, I concur in what has been proposed as to the disposal of this case.

Order appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 30th April, 1877.

Solicitor for Appellant: *Alfred Hendricks.*
Solicitor for Respondent: *J. Henry Johnson.*

[HOUSE OF LORDS.]

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1877
June 5.

THOMAS HUGHES . . . . APPELLANT;

AND

THE DIRECTORS, &c., OF THE METROPOLITAN RAILWAY COMPANY . . . RESPONDENTS.

Notice to Repair—Suspension of Effect of—Equitable Relief against Forfeiture.

54BD4

Where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejectment founded on the original notice.

A notice to repair, within six months, houses held on lease by the *Metropolitan Railway Company*, was given on the 22nd of October, 1874, to expire on the 22nd of April, 1875. It was answered by a letter of the 28th of November, suggesting that the lessor might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter on the 30th of December, that it was £3000. The lessors' solicitors on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No farther communication on this subject took place till the 19th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale" the company would take in hand the repairs. On the 20th of April the solicitors for the Appellant wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22nd of April the notice expired, and on the 28th the ejectment was served. After verdict for the Plaintiff and judgment in the Court below:—

Held, that the company was entitled in Equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair.

IN this case an action of ejectment had been brought to recover from the Respondents possession of certain houses, originally demised by a lease, dated the 15th of June, 1787, executed by the

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then Lord *Southampton* to Mr. *James Haygarth*. The tenancy was for ninety-nine years, to commence as from the 29th of September, 1786. The Appellant was the freehold reversioner of the property, and the Respondents were the assignees of the lease. There was the ordinary covenant "as often as need shall require during the term hereby granted," to repair,—and the lessor "and the person or persons for the time being entitled to the freehold or inheritance of the said premises, and his or their stewards, surveyors, and workmen, twice in every year or oftener" were to be entitled to enter and view the state and condition of the premises, and to give or leave notice in writing on the demised premises, for the amendment of all defects, and want of reparation. And the lessee covenanted within six months after such notice to repair.

On the 22nd of October, 1874, the Appellant's solicitors left with the Respondents a formal written notice to repair "within the space of six calendar months from the date hereof." On the 28th of November, 1874, the agents of the Respondents wrote acknowledging the receipt of the notice, and promising that "the repairs required by the covenants of the leases shall be forthwith commenced." The letter went on thus: "It occurs to us that the freeholder may be desirous of obtaining possession of the company's interest, which, as you know, is but short, and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest." On the 1st of December, 1874, the Appellant's agents wrote that if the Respondents "are willing to sell these houses, and give immediate possession, our client will, on hearing from you the price, consider whether it is worth his while to acquire the company's interest or not."

On the 30th of December, 1874, the Respondents' agents offered a surrender of the whole of the leases in consideration of a payment of £3000," and asked for an answer at "early convenience."

On the next day, the 31st of December, the Appellant's solicitors wrote to say that "having regard to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company is liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must therefore request you to reconsider the question of price, having regard to our previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you."

On the 6th of January, 1875, the Appellant's agents wrote to request payment of ground rent for the various houses which had been the subject of the correspondence, and to ask "the address of Colonel *Penley*, to whom you pay a rent of £100 a year" in respect of one of the houses. As to this house the answer, dated the 7th of January, 1875, was that the rent was paid to Colonel *Penley's* solicitors, Messrs. *Remnant & Penley*, of *Lincoln's Inn Fields*.

No other communication passed between the parties till the 19th of April, 1875. On that day Mr. *Bell*, the secretary of the Respondents, wrote from the company's offices to the Appellant's solicitors, "As the negotiations with your client have not resulted in a sale of the company's interest to him, and the weather is now favourable for the performance of the necessary works, our repairing staff will immediately take in hand the requisite repairs to the above premises."

On the 20th of April, 1875, the Appellant's solicitors wrote to Messrs. *Remnant & Penley* "with reference to Mr. *Bell's* letter to you we beg to say that the negotiations with Mr. *Hughes* were broken off in December last, and there has been ample time since then to have completed the repairs in accordance with the terms of the notice."

On the 22nd of April, 1875, the notice expired. On the 28th of April (the premises being alleged to be still out of repair) the writ of ejectment was served. After action brought the repairs were begun, and were completed somewhere in June.

The ejectment was tried before Mr. Justice *Denman* and a special jury on the 10th of November, 1875, when a verdict was found for the Plaintiff (the Appellant), and judgment was entered thereon.

On the 23rd of November a motion was made by the Defendants (the Respondents), to stay execution on equitable grounds. Lord *Coleridge*, in delivering the judgment of the Court (1), refusing the motion, referred to an affidavit made by the secretary of the company, in which it was stated that the Respondents presumed that the repairs need not be commenced until farther notice from the Plaintiff's solicitors, and that the six months would not include any time during which the negotiations were pending, and said, "we are of opinion, however, that even if the Defendants did assume what is here stated, they were not led to do so by anything said or done by the Plaintiff or his solicitors. It appears to us that the effect of the correspondence was this: first, to give to the company a reasonable time to make a fresh offer; and, secondly (if the negotiations were not resumed), to give the company a reasonable time (but not necessarily six months), from the 31st of December, to do the repairs required." Judgment was therefore ordered not to be stayed. The Defendants then gave notice of an application to the Court of Appeal that the order of the Court of Common Pleas might be reversed and all proceedings stayed, on such terms as the Court might think fit. The Court of Appeal granted this application; Lord Justice *James* intimating his opinion that "the lessor lulled the Defendants to sleep, intentionally lulled them to sleep, until it was too late for them to do the repairs." The order of the Court of Common Pleas was therefore reversed, and execution was ordered to be stayed, with costs (1).

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(1) Lord *Coleridge*, Mr. Justice *Brett*, and Mr. Justice *Lindley*.

This appeal was then brought.

Mr. *Southgate*, Q.C., and Mr. *C. Bowen*, for the Appellant:—

There was no pretence for saying that there had been a waiver of the notice to repair, nor had anything been done by the Appellant to suspend its operation. There had not been any request by the Respondents that its operative effect should be suspended, nor any concession of suspension by the Appellant. On the contrary, in the letter of the 31st of December, when the company's offer to sell for £3000 was rejected, the company's agent had his attention specially called to "the fact that the company have already been served with notice to put the premises in repair." Nothing, therefore, which the Appellant had done afforded any ground for this application for equitable relief. In *Gregory* v. *Wilson* (2) Vice-Chancellor *Turner* said that Equity would not relieve against the

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(1) Law Rep. 1 C. P. D. 120, where all the correspondence is fully set out.

(2) 9 Hare, 683; 22 L. J. (Ch.) 159.

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legal consequences of a breach of covenant, and that a notice to quit for a breach of covenant was in fact a warning to be more vigilant in the performance of the covenants. So, in *Nokes* v. *Gibbon* (1) Vice-Chancellor *Kindersley*, while adopting that rule, said that where one covenant had been clearly broken, Equity would not interfere to stay an ejectment. In *Bargent* v. *Thomson* (2) the Court only interfered because, out of twenty-two items twenty had been duly proceeded with and fourteen actually completed, and any delay which had occurred was attributable to the weather. Here nothing of that sort could be alleged, and the delay was altogether the delay occasioned by the utter neglect of the Respondents to do anything in the matter.

Mr. *E. Kay*, Q.C., and Mr. *W. G. Harrison*, Q.C., for the Respondents, were not called on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the decree of the Court of Appeal which is brought before your Lordships in this case is one which has the support of all the five Judges who constituted the Court of Appeal at the time. One of the learned Judges, Mr. Baron *Cleasby*, no doubt assented to the decision with some hesitation, but it was a unanimous decision of the Court.

My Lords, I own that the able argument which your Lordships have heard has raised no doubt whatever in my mind as to the propriety of that decision. I say the propriety of the decision, although at the same time I am not able, as to one part of the case, to take the view which one, at least, of the learned Judges who pronounced the decision, appears to have taken. Lord Justice *James*, in the observations which he made, is reported to have said this: "I am of opinion" "from all this correspondence, that the lessor" (that is the present Appellant) "lulled the Defendants to sleep, intentionally lulled them to sleep, until it was too late for them to do the repairs, that he intentionally induced them to wait till the six months were nearly over, and then sought to enforce the forfeiture." That not merely states a case which would entitle the Court of Equity to give relief, but states a case as against the

(1) 3 Drew. 681; 26 L. J. (Ch.) 433.
3 Jur N.S. 726

(2) 4 Giff. 473.

Appellant which imputes to him a serious offence in point of morals. My Lords, I am bound to say, and I think the Appellant is entitled that I should at once say, that I see no evidence whatever for fixing upon the Appellant the stain which these observations would fix upon him. I am unable to see that there is any evidence in this case, that there was any intention on the part of the Appellant, to lull the Defendants to sleep, in order that he might wait until the six months were nearly over, and then take advantage of a forfeiture. For reasons which I am about to state, I am of opinion that the Appellant cannot take advantage of a forfeiture, but in my opinion there was no intention whatever on his part to practise any wrong upon the Respondents. I think that both parties, almost unintentionally—I have very little doubt, without reflection—placed themselves in a position in which the one, the Appellant, as against the other the Respondents, was not entitled to enforce the forfeiture which he might have enforced at law; but that arose, not from any intention on his part to do a wrong to the Respondents, but merely from circumstances which had occurred, and to which I am now about to refer.

My Lords, the Appellant was the landlord of certain premises in the *Euston Road*, the lease of which, an old and a long lease, was vested in the Respondents. There were in the lease covenants to repair, and to repair after notice. Notice had been given and served upon the Respondents by the Appellant on the 22nd of October, 1874; it was a notice to repair the premises within six months; that six months would therefore expire on the 22nd of April, 1875. Nothing was done by the Respondents between the 22nd of October and the 28th of November. On the 28th of of November the agents of the Respondents wrote to the solicitors of the Appellant a very important letter. There can be no doubt that the letter refers to the premises in question, although it refers also to other premises. It states that the notice to repair had been received, and that the repairs required by the covenants of the lease "shall be forthwith commenced," but then it adds: "It occurs to us that the freeholder may be desirous of obtaining possession of the company's interest, which, as you know, is but a short one, and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest." Now, if these two parties, the Appellant and the Respondents, were really minded to treat for the purchase of this lease, of course it was to the interest of both parties that the doing of these repairs should be suspended, and that the property should be bought as it then stood, because it might be desired to apply it to purposes for which the repairs would be useless—and I read this as a definite intimation on the part of the Respondents that they would not proceed to execute the repairs (although they stated their readiness to commence them forthwith), if they found that there was a probability of an arrangement to purchase being come to.

The Appellant, when he received that letter, might have said, I have no intention of becoming a purchaser; or he might have said, I may become a purchaser; but if a negotiation is to be commenced you must understand that it is to be without prejudice to my notice to repair; you must go on and make the repairs as if there was no negotiation; or he might have said simply, I will adopt what you propose and enter upon a negotiation, saying nothing farther. That third course is the course which he took, and it is a course which, as it seems to me, when taken, carried with it the intimation that he was satisfied with the footing upon which the matter was put by the letter which he was answering. This is what his solicitors say in their letter of the 1st of December: "If the company are the owners of" certain other houses, "and are willing to sell them all" (that is all the houses), "and give immediate possession, our client will, on learning the price, consider whether it is worth while to acquire the company's interest or not. In mentioning the price, please to give us particulars of the tenancies and rents paid to the company."

Now, that being a letter which, as it appears to me, acceded to the suggestion that the repairs were to be deferred until it was ascertained whether an agreement could be made for the purchase, on the 4th of December that letter of the 1st was replied to, and replied to in this way: "We are in receipt of yours of the 1st instant. The particulars and terms asked for shall be sent in the course of a few days." Again, on the 30th of December, the agents of the Respondents write to the solicitors of the Appellant: "We send you herewith a statement of the company's receipts and payments in respect of the houses in *Euston Road* as requested by you. The company will agree to surrender the whole of the leases in consideration of a payment of £3000. We shall be glad to hear from you at your early convenience." That is followed by the particulars of the *Metropolitan Railway Company's* interest in the houses in *Euston Road*, the property of Mr. *Hughes*. There is a somewhat lengthy schedule, and it is obvious that the preparation of that schedule was a work which would easily account for the lapse of time between the 4th and the 30th of December. It was a schedule which was required by the Appellant. Time was required to prepare it, and your Lordships come therefore to the 30th of December with clear proof that no time whatever had been lost between the 28th of November and that day.

The offer, then, standing upon the letter of the 30th of December, that letter is replied to by the solicitors of the Appellant in these words: "We have duly received your letter of yesterday's date enclosing a statement of the company's receipts and payments in respect of the houses in *Euston Road*, and at the same time intimating that the company will agree to surrender the whole of the leases in consideration of the payment of £3000. Having regard, however, to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company are liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you."

My Lords, I think it unnecessary to go beyond that letter. That is a letter which, a price of £3000 having been proposed, repudiates that price, refuses to give it, and asks for a modified proposal. No modified proposal, in point of fact, was made. But I will put the matter in the most favourable way for the Appellant. I will assume that in place of asking for a modified proposal that had been a letter which had at once terminated the negotiation. No farther proposal having been made in substance the negotiation then determined. I will assume that the letter, upon the face of it, had terminated the negotiation, and now I ask your Lordships to consider what would be the consequence. There had been a notice in October to repair in six months. The effect of the letter of November, as it seems to me, was to propose to the Appellant, and the farther letter of the Appellant had the effect of an assent by the Appellant, to suspend the operation of that notice in order to enter upon a negotiation for the purchase and sale of the lease. That negotiation was entered upon, and, as I have assumed, came to an end on the 31st of December. My Lords, it appears to me that in the eye of a Court of Equity, or in the eye of any Court dealing upon principles of Equity, it must be taken that all the time which had elapsed between the giving of the notice in October and the letter of the 28th of November was waived as a part of the six months during which the repairs were to be executed, and that all the time from the 28th of November until the conclusion of the negotiation, which I have assumed to be on the 31st of December, was also waived—that it was impossible that any part of that time should afterwards be counted as against the tenant in a six months' notice to repair. The result would be, that it would be on the 31st of December, as the first time, that time would begin to run, for the purpose of repairs, as against the tenant.

Then occurs the question, what time from the 31st of December would be given? My Lords, what a Court of Equity would have done if it had found that the tenant after the 31st of December had taken no steps to make the repairs, and that a period of six months had run from the 31st of December without any repairs having been made, it is not necessary here to consider. In point of fact the repairs were made within six months, from the 31st of December; and my Lords, I cannot but think that the lease having prescribed a period of six months, as that which in the eyes of the contracting parties was a reasonable period, within which to make such repairs as those, a Court of Equity would hold, and would be bound to hold, that the negotiation having been broken off on the 31st of December, the repairs were in this case executed within that which according to the view of the parties was a reasonable time for the execution of such repairs.

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My Lords, it is upon those grounds that I am of opinion that the decision of the Court below is correct. It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. My Lords, I repeat that I attribute to the Appellant no intention here to take advantage of, to lay a trap for, or to lull into false security those with whom he was dealing; but it appears to me that both parties by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months dating from the month of October should afterwards be measured out as against the Respondents as the period during which the repairs must be executed.

I therefore propose to your Lordships that the decree which is appealed against should be affirmed, and the present appeal dismissed with costs.

Lord O'Hagan:—

My Lords, I am of the same opinion. Your Lordships have no power to relieve against the effect of a forfeiture such as was legally established by the verdict of the jury in this case, merely on the ground that it has pressed hardly on the Defendants. They entered into a covenant: and if they have failed to fulfil their undertaking they must abide the results, however onerous, unless the circumstances excuse their default in the view of a Court of Equity. But if they acted, or failed to act, through a mistake induced by the conduct of the Plaintiff: if they were misled by it into the belief that his strict legal right was abandoned or suspended for the time, he cannot be allowed to take advantage of the forfeiture which was so accomplished.

I am bound to say, with my noble and learned friend on the woolsack, that I see no evidence to impeach the Plaintiff of *mala fides* or misrepresentation or wilful lulling of the Defendants into a disregard of their legal duty or a compromise of their legal rights. But this does not affect the question. If there was real misleading and *bonâ fide* mistake, it does not matter that the Plaintiff acted honestly and without indirect purpose of any kind. The facts of the misleading and mistake are enough to prevent the forfeiture, although they had their origin in no corrupt intention. Now, we have it sworn, on behalf of the Defendants, that they were put off their guard and induced to postpone the making of the needful repairs, within the appointed time, by the negotiation which was pending. The letters and the oral proof put that negotiation beyond controversy. It continued, at least, from the 28th of November until the 31st of December: and the learned counsel failed altogether in contending that, during that period, at all events, the operation of the notice was not suspended. Both parties contemplated, as the issue of it, a sale of the premises: and, of necessity, the question of repairs was put out of consideration. No doubt they might have agreed that the negotiation should be without prejudice to the notice; but they did nothing of the kind. It seems to me quite clear that time working forfeiture did not run during that negotiation: and I incline to agree with an observation of my noble and learned friend opposite, (Lord *Selborne*), in the course of the discussion that the period which had elapsed before the beginning of it, after the notice was given, cannot be taken into account and pieced on to that which elapsed after it had ended, to make up the six months and complete the default. But it is not necessary to pronounce on this point with a view to our decision.

Well, so the negotiation continued until the 31st of December. Did it then conclude? Quite the contrary. The Plaintiff expressly dealt with it as still subsisting; and, having refused the offer already made to him, invited another. To his invitation he got no reply, and he proceeded to act upon his notice. I quite concur with Lord Justice *Mellish* that his proper course would have been to inform the Defendants, within a reasonable time, that failing to make a new proposal they should understand the negotiation to have been concluded and the parties relegated to their legal rights. This would have been a reasonable and equitable course: but it was not taken, and the Plaintiff must bear the consequences. I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD SELBORNE:—

My Lords, I am of the same opinion, and for the same reasons. I agree that there is nothing at all requiring your Lordships to throw any doubt upon the good faith of the Plaintiff in this case.

In reality I think that the difference between the Court of Common Pleas and the Court of Appeal comes to a short and a very simple point. Lord *Coleridge* in delivering the judgment of the Court of Common Pleas says (1), this: "It appears to us that the effect of the correspondence was this, namely, first to give to the *Metropolitan Railway Company* a reasonable time to make a fresh offer; and, secondly (if the negotiations were not resumed), to give the company a reasonable time (but not necessarily six months), from the 31st of December to do the repairs required." The real point in difference is, what was a reasonable time under the circumstances of the case? As to the effect of the correspondence down to the 31st of December, and, I may add, for some not definite time afterwards, there really is an agreement of both Courts that the first two and a half months of the notice or thereabouts were waived; and I must say that looking at the terms of the correspondence, I can see no reasonable room for doubt about it, because the first letter of the 28th of November, 1874, says as clearly as possible these two things:—If you require it, the repairs which we have received notice to make shall be forthwith commenced, but we have an alternative proposition to make, and, if you entertain that alternative proposition, then we propose to defer the commencing of the repairs until we hear from you that we shall commence them: that is the effect of it; and the accession

(1) 1 C. P. Div. at p. 129.

to that in the subsequent correspondence by the Plaintiff is as plain as if he had said in terms; I do not require you forthwith to commence the repairs; I am willing to enter into the treaty that you propose; it is not improbable that an arrangement may be made, and therefore I agree that the commencement of the repairs may be deferred as you suggest.

That goes on until the 31st of December, and then, although the notice is referred to, it is manifestly not referred to as putting an end to that understanding at that exact period of time; it is referred to as an element of price, to be considered in the new offer which is invited. I really do not think it necessary to inquire whether the Respondents could reasonably be heard to say that they were at liberty to do nothing for four months afterwards, expecting some farther notice from the Plaintiff. I confess that my impression is not so; but taking it not to be so, what is the result? Why this, you have got the affidavit upon which the present application for the equitable jurisdiction of the Common Pleas Division is made—the affidavit of Mr. *Bell*—who positively states that "no objection having been raised by the Plaintiff's solicitors to the repairs standing over during the negotiations, the company presumed the repairs need not be commenced until farther notice from the Plaintiff's solicitors." I do not agree to that—at all events, I think that that is a ground which need not be taken as the foundation of the judgment, and could not safely be taken by the company. But he goes on, "and that the six months within which the repairs were to be done would not include any time during which the negotiations were pending." Then he says in the next paragraph that the repairs were actually "finished by the middle of June, 1875, being within six months from the earliest date at which the negotiations for a sale of the company's interest to the Plaintiff might be taken to have been broken off," which manifestly must mean the 31st of December, or a few days afterwards.

Now the question is, whether the conduct of the Plaintiff in the correspondence justified and naturally led to that impression on the part of the company? In my opinion it clearly did; and if it did, what is the consequence? I think the consequence is that which Lord Justice *Baggallay* derives from it. He says that the circumstances "were of a character to lead the company to consider that the notice to repair was at any rate suspended for some period of time," at least until the 31st of December. What is the meaning, in the view of a Court of Equity, of suspending a notice to repair? Manifestly that during that time the notice is not to be operative. What is the reasonable result of that in the circumstances of this case? Why, when the notice is to become operative, the same will be a reasonable time for the execution of the repairs which would have been a reasonable time if the notice had been given at that period, that is, six months from at least the 31st of December, 1874.

Therefore, my Lords, upon these grounds, I entirely agree that the judgment of the Court of Appeal is right.

LORD BLACKBURN:—

My Lords, I also entirely agree in the judgment, but I think it right to say that I likewise completely agree in the opinion that there is no ground for supposing that the Plaintiff or the Plaintiff's advisers, who were acting for him in writing the letters of November and December, intended, by acting as they did, to bring the Defendants into a scrape and to take advantage of it. I think Lord Justice *James* misapprehended the facts when he said so, and I think it is right to say that I consider that that was not the case. But I quite agree that notwithstanding that, there is equity to relieve the Defendants, and instead of putting it in my own words, I will read those which are given to Lord Justice *Mellish*, adopting them as my own because I think they exactly express what I believe to be the right law (1): "But even if the Plaintiff himself did not intend to abandon the notice, yet if his conduct was such as to put the Defendants off their guard, and to lead them to believe that the six months' notice would not be insisted on, there is a ground for giving relief in Equity. The result of waiver is different, for the notice is gone at Law, whereas Courts of Equity, though they relieve against the forfeiture, will still compel the lessee to put the house into substantial repair, and will give the landlord all that he is really entitled to, only preventing him from enforcing a forfeiture that would be inequitable."

My Lords, I apprehend that that correctly states the rule of equity and justice, and that the only remaining question is, whether in the present case there has been such a misleading as is there described? I think not at all an intentional misleading, but such an inducing the Defendants to think that the actual six months would not be insisted upon, and farther, what period that delay in insisting upon the actual six months would give them.

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(1) 1 C. P. Div. at p. 135.

I shall not repeat what has been said by the noble and learned Lords who have spoken before me as to the effect of the correspondence. I think it quite clear that there was an inducing the Defendants to believe that they need not repair during the period up to the 31st of December, at all events, and that it was not until the 31st of December, or perhaps a short time afterwards, when the time for making a fresh offer had elapsed, whenever that might be, that it could be considered that they were not under an apprehension, induced by the Plaintiff's conduct, that they need not make the repairs at that time. Then comes the question, which after all is the question upon which the Court of Appeal below has differed from the Court of Common Pleas, whether the period within which the repairs ought to have been executed after the negotiation went off (which I will assume to have been on the 31st of December) was a reasonable time, in the sense of such a time as a jury, on the evidence, might say was sufficient to make the repairs of the houses, or whether it was the conventional time of six months provided for in the lease? If it were a reasonable time within which the repairs might have been made, then the fact that the repairs were actually commenced in April and were finished by the middle of June—that is to say, in two months—would shew that the time between the 31st of December and the 24th of April, when the notice had run out by efflux of time, which was three months, would have been sufficient. If in two months the repairs were actually done, no one would dispute that three months would be a reasonable time to do them in. But then, is it correct to say that we are to take a reasonable time, in the sense of an uncertain time, according to the evidence, when we have a conventional time, namely, six months, stipulated for? I think the very object for which the stipulated time of six months was named, was to prevent that uncertainty in saying what would be a reasonable time, and to enable one of the parties to know that he had got six months to do the repairs in, even if that was more than was needed, and to enable the other to know that whether it turned out to be either too much or too little, the repairs were to be done within that time.

Applying that to the present case, when it is once established that the Defendant was entitled to say that out of the six months shall be taken the time up till the 31st of December, because I was authorized by the Plaintiff to hold my hand and not begin the repairs until then, it follows that the time within which he was to do the repairs would be six months after the 31st of December, and that time would not expire until the 31st of June, and, in fact, the repairs were all done before that—they were done by the middle of June. That being so, it appears to me that the judges in the Court of Appeal were correct in the judgment which they gave. The only point that I can see upon which they and the Common Pleas differed was whether it was to be six months, or an uncertain but reasonable time; and it seems to me that it ought to be the conventional time of six months, whether it was more or less than was actually required for the purpose. Consequently, my Lords, I think that the judgment of the Court of Appeal was right and ought to be affirmed, and this appeal dismissed with costs.

LORD GORDON :—

My Lords, I quite agree in the judgment of the Lords Justices, with the exception of that matter in Lord Justice *James's* opinion to which reference has been made, with regard to the intention to mislead on the part of the Plaintiff. There is really no ground and was no necessity for condemning his conduct in that respect.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 5th June, 1877.

Solicitors for the Appellant: *Campbell, Reeves, & Hooper.*
Solicitors for the Respondents: *Burchells.*

[HOUSE OF LORDS.]

EDMUND BOWES, J. B. MARTIN, AND W. L. KENT . . . . APPELLANTS;

AND

CHARLES SHAND, ALEXANDER SHAND, AND R. A. ROBINSON . . . . . . RESPONDENTS.

H. L. (E.)
1877
June 7, 8.

Cargo—Time of Loading—Condition Precedent—Usage of Trade—"Shipped"—Costs.

4 C P
5 Aff
904

The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the Court.

Two contracts, each for the sale of 300 tons of rice, were made in *London.* The first contract (which the second exactly followed) was for 300 tons "of *Madras* rice, to be shipped at *Madras,* or coast, for this port, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, *per Rajah of Cochin.*" The 600 tons filled 8200 bags. The vessel arrived at *Madras* in February, and on the 23rd of that month 1780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3560 bags were put on board, and bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1080 bags was given on the 3rd of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March $\frac{\text{and}}{\text{or}}$ April:—

Held, that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the Plaintiffs could not recover on the contract.

Per LORD BLACKBURN:—If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described.

The judgment of the Court of Appeal was reversed, and that of the Court of Queen's Bench restored, with costs.

Observations on "shipped" and "shipment."

Alexander v. *Vanderzee* (1) considered.

THIS was an action brought by *Shand* and others against *Bowes* and others for not accepting a cargo of rice.

The Plaintiffs carried on business in *London* and at *Madras,* and were the charterers of a vessel named the *Rajah of Cochin*. *Bowes & Co.* were colonial brokers in *London*.

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(1) Law Rep. 7 C. P. 530.

The declaration stated the contract to be that "the Plaintiffs should sell and deliver to the Defendants, and the Defendants should buy and accept from the Plaintiffs . . . . *Madras* rice, to be shipped at *Madras*, or coast, for the port of *London*, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, about 300 tons, *per Rajah of Cochin*," at &c., for "fair pinky." The prompt was to be "one month from breaking bulk." There was another contract for the same number of tons, expressed in the same form of words. The particulars of shipment to be declared when received. Plaintiffs alleged the arrival of the vessel and the refusal to accept.

The Defendants put several pleas on the record. The 5th alleged that the contract was made subject to the condition that the rice should be shipped at *Madras*, or coast, for the port of *London* during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, and at no other time; that it was not so shipped, but at some other and earlier time, and thereby was rice different in description and character from the rice in the contract mentioned. The 12th plea, which related to the contract for the second 300 tons of rice, repeated this defence.

There was also a denial that the particulars of the shipments had been furnished in due time. Issue on the pleas.

The cause was tried at Guildhall before Mr. Justice *Brett* and a special jury in the Michaelmas Sittings, 1875.

It appeared in evidence that the loading of the *Rajah of Cochin* was begun on the 17th of February, 1874, and between that date and the 1st of March, 1874, 8150 bags were put on board. On Monday, the 2nd of March, the remaining fifty bags were put on board. Four bills of lading were signed by the master and delivered to the shippers. They were dated on the 23rd, 24th, and 28th of February, and the 3rd of March, and acknowledged the receipt on board on those several days of 1780 bags, 1780 bags, 3560 bags (all in February), and 1080 bags in March. The ship sailed from the *Madras* coast on the 10th of March, 1874, and arrived at *London* on the 14th of August. A correspondence took place between the parties, and on the 7th of September

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Bowes & Co. refused to accept the rice. It was sold in December at a loss, and the action was brought to recover the difference between the contract price and the price obtained at the sale.

Mr. *Robinson*, one of the Plaintiffs, was called as a witness at the trial, and, on cross-examination, he was asked whether a contract for a March or April shipment of rice did not mean that the rice was to be put on board in March or April, and he said (1) "when we sell rice, March or April shipments, it means that every bag should be put on board in March or April;" but he afterwards added, "there is a difference when the ship is named, in this respect." He stated that the particulars of shipment here were in fact declared as soon as received. On the part of the Defendants, witnesses were called who asserted that it would not be a March or April shipment if a single bag was shipped in February. The Defendant's manager said, "The bill of lading proves the date of shipment in absence of proof to the contrary."

One witness, Mr. *Fraser* (chairman of the *Rice Brokers' Association*), said: "The meaning of the phrase, 'Cargo March or April shipment,' is that every bit of the cargo is to be put on board in March or April." The learned Judge left the case to the jury in this form, "Was this cargo, as a cargo, a shipment in March $\frac{\text{and}}{\text{or}}$ April in the ordinary business sense of the term? If it is for me, I hold the meaning to be, that, if the loading has been conducted consecutively, with ordinary and reasonable dispatch, and is completed in March or April, so that the vessel, so far as the loading of the cargo is concerned, may sail in March or April, that is sufficient." The verdict was found for the Plaintiff, the foreman of the jury adding, "The name of the vessel being given in the contract." Mr. Justice *Brett* asked, "You agree with me that if the loading has been conducted consecutively, with ordinary and reasonable dispatch, and is completed in March or April, so that the vessel may sail in March or April, that is sufficient?" The foreman answered, "We do, more especially where the name of the vessel is mentioned." Leave to move was reserved.

A motion was made for a new trial, on the ground that the

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(1) Judge's notes of the trial contained in the printed papers.

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verdict was against the weight of evidence; but the Court, finding that Mr. Justice *Brett* was satisfied with the verdict on that point, refused that rule. A rule was then obtained to enter judgment for the Defendants; and on the 26th of April, 1876, the Queen's Bench ordered the judgment to be so entered (1). On appeal that judgment was reversed (2). This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Gainsford Bruce*, for the Appellants:—

The words of the contract here are clear and express. The rice is to be shipped during the months of "March $\frac{\text{and}}{\text{or}}$ April." No other time can be substituted for the months thus named. There is no proof of a usage of the trade to give these words any but their ordinary and natural signification. On the contrary, the great weight of the evidence, even the admission of Mr. *Robinson*, one of the Plaintiffs, was the other way, and shewed that what was so stipulated must be literally performed. The suggestion that the mere naming of the vessel could affect the express words of the contract cannot be sustained. The case of *Alexander* v. *Vanderzee* (3), relied on by the Plaintiffs in the action, has really no application to this case. The whole contract there was doubtful. The ships were not known and could not be named. They were to be "three or more first-class vessels," and the shipment was to be in June or July, at the seller's option. The ships, such as were described, might not be obtained in the months named, a very large portion of the maize had really been loaded on board in June, and the bills of lading were dated in June. Substantially the shipment was in June, and the words of the contract were complied with. Here, on the contrary, by far the largest portion of the rice was put on board in February; only the very smallest, merely fifty tons, being loaded on the second day of March; and three out of the four bills of lading were dated in February. The jury had, therefore, in that case some ground for saying that the shipment was in June, while here there was no ground whatever for saying that the shipment was in March or April. The latter month was entirely out of the question. The former was so in substance and in fact. The conditions of sale had, therefore, not been complied with. The purchaser of this cargo has stipulated for a particular time during which the cargo shall be put on board, and he is entitled to the performance of what he has stipulated for. In *Busk* v. *Spence* (1) the cargo was loaded in proper time at *St. Petersburgh*, though the ship did not sail as warranted; but, there being a stipulation in the contract that the seller, as soon as he knew the name of the ship, should mention it to the buyer, and he not having done so for eight days after he had received it, Lord Chief Justice *Gibbs* held that this was a condition precedent, which not having been fulfilled, the Plaintiff could not recover. The stipulation here is a condition precedent. In *Graves* v. *Legg* (2) that rule was expressly acted on. There wool of a particular sort was to be deliverable at *Odessa* during August, and the names of the vessels were to be declared as soon as the wool was shipped. The defence to an action for not accepting the wool was, that in that trade the wool was not saleable until the names of the vessels in which it was shipped had been declared, and that the Plaintiff had neglected to declare them, and the defence was held good, for that the obligation to declare the names of the vessels was a condition precedent. Lord Justice *Mellish*, in this case, was wrong in treating the shipment of the very last portion of the cargo as practically a shipment of the whole cargo, for it was clear that there was a difference in the value of the cargo according to the time at which the period of shipping took place, and therefore it was that the purchasers had fixed the shipment at a particular time, and their distinct and express stipulation to that effect constituted a condition the observance of which could not be disregarded. Here, too, the Plaintiffs were bound to declare the particulars of the shipment when received, which they had not properly done, and in that respect, too, they had failed to perform their part of the contract.

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(1) 1 Q. B. D. 470.

(2) 2 Q. B. D. 112.

(3) Law Rep. 7 C. P. 530.

Mr. *Cohen*, Q.C., and Mr. *J. C. Mathew*, for the Respondents:—

There is no real force in the objection that the particulars were not here delivered in time, the fact is the other way, and the cases referred to on that point are therefore inapplicable.

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(1) 4 Camp. 329.

(2) 9 Ex. 709.

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The real question in this case is whether, because the cargo was begun to be loaded in February, though the loading was not completed till March, the Defendants have a right to reject it? No just ground can be discovered for such a right. The limitation as to time means that the farthest extent of that time is not to be exceeded, and the Plaintiffs were really doing what must be believed to have been desired by the Defendants in beginning the loading in February, so as to be quite certain of finishing it in March. Shipped on board always means the concluding act of shipment, for till all the cargo has been put on board there is nothing which amounts to a shipment; the vessel is not able to sail till then, and nothing which the owner of the cargo requires can be said to have been effectively done. In *Alexander* v. *Vanderzee* Mr. Baron *Martin* said (1): "The words are 'for shipment in June or July, shipper's option.' The intelligible meaning of those words is not that the grain shall be ready for shipment in those months, nor that it shall be put on board in those months, but that it shall be loaded so that the ship may sail in June or July;" and he added that that was a question, not for the Judge, but for the jury. The meaning of the words is necessarily that which the usages of trade recognise, and that was distinctly left to the jury, and has been found by the jury in favour of the Plaintiffs. In that respect there can be no difference between the shipment of a "cargo" of rice and the shipment of so many "tons" or so many bags of rice. Till all are put on board the cargo is not on board, and, till then, there cannot be said to be a shipment of the rice beneficial to the owner of it.

In a case of this sort evidence of the usage of trade is admissible to explain the contract: *Lewis* v. *Marshall* (2); here the jury treated that evidence as in favour of the Plaintiffs. *Alexander* v. *Vanderzee* (3) was a case where the shipment of the maize was only partially made in the months named in the contract, and there was evidence in that case that maize shipped in May was more liable to get damaged than maize shipped in June, yet evidence of the usage of the trade was admitted, the question was left to the jury, and it was held that it was a proper question to be so left, and the decision of the jury upon it was accepted as conclusive. It ought to be so accepted here. There was no pretence for saying that the putting the rice on board in March or April was a condition precedent which must be specifically performed. That was like the promise by a foreign singer to be in *London* in time for rehearsals, which was held in *Bettini* v. *Gye* (1) not to bear that character, and the non-execution of which did not affect his rights upon the contract. The general object of the contract was there taken into consideration by the Court. *Graves* v. *Legg* (2) was really a case in favour of the Plaintiffs, for it was the usage of the trade, the understanding of that usage by both sides, and the introduction of the particular stipulation into the contract, that were taken to be proofs of the intention of the parties to make the stipulation as to the names of the vessels a condition precedent; that constituted the ground for the judgment of the Court. There was nothing of that sort here. The words "March $\frac{\text{and}}{\text{or}}$ April" were only words of description, limiting the time before the expiration of which the shipment was to be concluded; but there was nothing to shew that the parties had intended that the shipment was to begin and to proceed in those months, and in them alone, and at no other time; and certainly nothing to indicate that the shipment was not to be begun before March. Nor could the fact of a great part of the shipment having been made in February afford a ground for the absolute rejection of the cargo. If any damage was thereby occasioned, it was the subject of a cross action.

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(1) Law Rep. 7 C. P. 530, at p. 533.

(2) 7 Man. & G. 729; 13 L. J. (C.P.) 193.

(3) Law Rep. 7 C. P. 530.

Mr. *G. Bruce* replied:—

This is a special contract with an express condition, and that condition has not been complied with. The foundation of the action therefore fails.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I regret to have to propose to your Lordships to dissent from the decision, the unanimous decision, of the Court of Appeal in this case; and if I entertained any doubt, or if I had found that your Lordships entertained any doubt, as to the conclusion at which you should arrive, I certainly should have suggested that time should be taken for further consideration of the case. But I think your Lordships have no hesitation in arriving at the conclusion which I shall now propose to you.

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(1) 1 Q. B. D. 183.

(2) 9 Ex. 709.

My Lords, the case appears to me, when properly considered, to be an extremely simple one. The action is brought upon two contracts for the sale of rice, which differ only in respect of the price, and therefore it will be sufficient that I should refer to one of the contracts. The first of the two contracts is dated on the 17th of March, 1874; and the sold note, which is written to the Respondents, *Shand & Co.*, runs in these words: "We have this day sold for your account to *Bowes, Martin, & Kent*, the following *Madras* rice to be shipped at *Madras*, or coast, for this port during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, about (300) three hundred tons *per Rajah of Cochin*, eleven and ten pence halfpenny per cwt.; for 'fair pinky.'" That sentence includes all that for the present purpose it is material that I should refer to.

My Lords, so far as the construction of the contract expressed in those words is concerned, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the Court. That has been said so often that I need not refer your Lordships to any authority upon the subject. The Court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade, to any of the words of that contract, has to place the construction upon the contract. I shall assume, in the first place, that there is no word in this contract which is proved by the custom of the trade to have any particular meaning. I shall afterwards consider whether it has been proved that there is any custom attaching a particular meaning to the words used.

My Lords, looking at the construction of these words, I put aside in the first place some which to any one unaccustomed to a contract of this kind, might appear peculiar, the words $\frac{\text{and}}{\text{or}}$, inasmuch as no question has been raised on these words, and it is agreed upon both sides that they are so used simply as a mercantile way of expressing that something is to be done in the months of March and April, or in either of those months. Putting that aside, and looking still at what would be the ordinary and the grammatical meaning of the words, it will I think occur to your Lordships that it is possible that the words which I have read may mean one of two things. It might be held that they mean that the rice which is spoken of, is to be put on board the ship which is mentioned, during some part of the two months specified, the months of March and April, 1874, and that that is the meaning of the words "to be shipped" during those months, or it might be held that they mean that the shipment is to be made continuously and in such a way as that it is to come to a conclusion in one of the months in question, and then a bill of lading, representing the shipment and the contract made on the shipment, is to be given inside of one of those months for the whole of the rice in question.

My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer. But, if necessary, a farther answer is obtained from two other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment. Therefore it may well be that a merchant making a number of rice contracts, ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times, and at such intervals of time, as that it will be convenient for him to make the payments, and it may well be that a merchant will consider that he has obtained that end if he provides for the shipment of the rice during a particular month, or during particular months, and that he will know that provided he has made that stipulation the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment. My Lords, there is still another explanation which appears upon part of the evidence in this case; because sufficient appears upon the evidence to shew that these contracts were made for the purpose of satisfying and fulfilling other contracts which Messrs. *Bowes, Martin, & Kent,* had made with other persons, and it is at least doubtful whether if they had made a contract in any other form than that which is before your Lordships, a contract made in another form, or a contract made without this stipulation as to the shipment during these months, would have been a fulfilment of those other contracts which they desired to be in a position to fulfil.

Therefore, my Lords, still dwelling merely upon the natural meaning of these words, and without any evidence as to their having any particular or customary meaning, I should undoubtedly say, and say without hesitation, that the meaning of this contract must be one of two things. *Primâ facie,* I should say it meant that the shipment must be made, that the rice must be put on board, during the two specified months, and neither before nor after those months. But if the contract does not mean that, the only other meaning which it appears to me it could have is—and as to that I think evidence would be required to shew that by usage it had obtained that meaning—that the shipment should be made in a manner which could be described as continuous, and that it should come to a consummation or completion in one of these months which are here mentioned, and that the bill of lading should be given for the whole and complete shipment at that time. My Lords, if those two meanings be the only possible meanings of this contract, if they be the natural meanings of the contract, then according to neither meaning was the rice in this case put on board in such a way that it could be tendered in fulfilment of the contract; because the whole of the rice was actually on board, not merely at the time when this contract was made, but during the month of February, with the exception of fifty bags, which were put on board on the 2nd of March; and bills of lading had been given during the month of February for all the parcels of the rice with the exception of 1080 of the bags in respect of which a bill of lading was given on the 3rd of March. According, therefore, to neither of those constructions would the rice have been put on board in such a way as to make it a tender in fulfilment of the contract.

My Lords, still dwelling upon the case without reference to what took place at the trial, or to any evidence with regard to any custom, I now turn from this construction, which I submit to your Lordships is the natural and only possible construction, literally, of the words, to the construction which the contract has received in the Court of Appeal. Lord Justice *Mellish* on this subject speaks in this way. He says: "The real question is, whether in order to fulfil a contract that 600 tons of rice should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April."(1) He then refers to a case which I shall afterwards have to refer to, and he continues: "The word 'shipped' is, we think, capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a fresh additional burden on the seller, without any corresponding benefit to the purchaser, and the consequence of adopting it would, we think, be that purchasers would, without any real reason, frequently obtain an excuse for rejecting contracts when prices had dropped."(1) My Lords, I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the

(1) See 2 QBD. 115.

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contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.

My Lords, the Lord Justice continues: "The sole object of the purchaser of such produce as this, in confining the seller to a particular time within which the goods must have been shipped, is, as far as appears, that he may know when the goods are likely to arrive."(2) The Lord Justice takes no notice whatever of those other reasons to which I have referred, namely, that the merchant may not desire to be called upon before a certain time to pay the money, or that he may, in entering into a contract of this kind, have in view the fulfilment of some other contract, with an analogous stipulation, which a contract in any different form would not fulfil. The Lord Justice continues: "That object seems as effectually attained by knowing when the shipment will be, or has been, completed, as by knowing when each part of the goods was put on board."(2) Then, my Lords, the Lord Justice says: "We therefore should entirely agree with *Alexander* v. *Vanderzee* (1), even if that decision was not binding on us."(2)

Now, my Lords, that makes it right that I should refer for a moment to the decision in *Alexander* v. *Vanderzee* (1). The Court of Appeal in the present case appears to have thought that there was some rule of general application laid down by the decision of *Alexander* v. *Vanderzee* (1) in the Exchequer Chamber, and that that rule was binding, or ought to have been held binding, on the Court below in the present case. My Lords, I do not find that there was anything that could be called a rule laid down in the case of *Alexander* v. *Vanderzee* (1). That was a case in which a contract somewhat similar to the present, but for Danubian maize, was made, and the contract stated that the maize was to be shipped in the month of June, and what took place was this:—A great part of the maize was shipped in the month of May, that is to say, was put on board in the month of May. The remaining part was put on board in the month of June, and a bill of lading was given, on the completion of the shipment, for the whole parcel of maize. Then it appears that, at the trial of the case, this question was left to the jury: Was a shipment of maize, under those circumstances, commenced in May, concluded in June, and

(1) Law Rep. 7 C. P. 530.

(2) 2 QBD. 115.

the bill of lading for the whole given in June, according to the understanding of the trade a June shipment? The jury in that case found that it was a June shipment, and the majority of the Court of Exchequer Chamber thought that that question was properly left to the jury, and that the jury having answered it as they did, that disposed of the case. My Lords, your Lordships have not now to decide, and cannot now decide, whether what took place in the case of *Alexander* v. *Vanderzee* (1) was the course which ought properly to have been taken with regard to the conduct of the case. We have not before us the evidence which was before the jury, or the form in which the question was left to the jury; but in that particular case the question, which seems in some form or other to have been left to the jury, was whether it was a June shipment, and the jury found that it was a June shipment. My Lords, I will assume that that decision was right, and that the mode in which that case was treated was the correct mode. It has no application to the present case. Your Lordships have not here what occurred in the case of *Alexander* v. *Vanderzee* (1), a continuous shipment going on up to the period of completion, the completion being in the month specified, and a bill of lading given in that month. The case, therefore, of *Alexander* v. *Vanderzee* (1) in the first place laid down no general rule; it proceeded on the finding of the jury in that particular case, and, whether it laid down a rule or not, the rule would not be applicable to a case like the present, in which the facts are different from the facts which occurred there.

My Lords, before leaving that part of the case, I must advert to a suggestion which was made at the Bar on behalf of the Respondents, although it does not appear to have been made in the Court below. It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the Appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could shew that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of *Madras* rice to be put on board at *Madras* during the particular months. The construction may be shewn by evidence to be different from what I have supposed, but if the construction be that which I have supposed, the Plaintiff, who sues upon that contract, has not launched his case until he has shewn that he has tendered that thing which has been contracted for, and if he is unable to shew that, he cannot claim any damages for the non-fulfilment of the contract.

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(1) Law Rep. 7 C. P. 530.

Now, having submitted to your Lordships what I understand to be the natural and literal meaning of this contract, I ask how is that natural meaning to be got rid of? My Lords, I conceive in this way, and only in this way. It was of course competent for those who were resisting the application of this natural construction of the contract, to have said: We will prove by evidence that according to the custom of the trade, these words, which have this natural signification, are used in a wider or in a different sense. The natural meaning of the words is, no doubt, that the rice shall be shipped during those two particular months; but we will shew that by the custom of the trade a latitude is allowed, and that provided the shipment has been conducted in such a way as that the ship will be able to sail during those two months, that means by the custom of the trade the shipping of rice on board during the months in question. That of course would, according to the well-known rule of law, which admits parole evidence not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used. That would be a legitimate and well-known mode of construing the document. Has any evidence of that kind been adduced here?

This is a case which certainly is one of the most singular I have ever observed in this respect. The Defendants in the action put upon the record pleas, which repeated the stipulation in the contracts with regard to the shipment being made during the particular months, and one plea averred that the stipulation not only had that meaning, that the goods were to be put on board during those months, but that, negatively, they should not be put on board at any other time, and the parties went to trial upon those issues, among others. The Plaintiffs in the action did not propose to adduce, and did not themselves adduce, any evidence as to any custom which would put upon the words in question any meaning different from whatever might be their ordinary or natural meaning. But the Defendants not merely rested upon what they contended to be, and what as it seems to me was, the natural meaning of the words, but they proceeded to give evidence that that which was the natural meaning of the words was understood by the trade to be their real meaning, and to be the meaning which the trade was in the habit of acting upon. That appears to me to have been on the part of the Defendants a taking upon themselves an onus, and an effort to discharge an onus which, if it pointed to the producing of evidence at all was an onus that lay on the other side. It was for the Plaintiffs, if they had any evidence of a custom controlling or explaining the natural meaning of the words in the contract, to produce their own evidence, and it was hardly necessary for the Defendants to produce evidence which only professed to shew that the words meant what naturally they would have appeared to have meant. However, the evidence was produced, and very strong evidence was produced, by the Defendants to that effect, and what is still more remarkable, one of the very strongest pieces of evidence the Defendants had on that point was the evidence of one of the Plaintiffs, who, upon cross-examination, said, with at least as much distinctness and force as any of the other witnesses, that he would not consider rice put on board the ship during any months other than the two months specified to be a tender within the meaning of this contract. My Lords, in that state of things, so far from any evidence being produced by the Plaintiffs to alter the natural meaning of the words, all the evidence was evidence going to shew that the words ought to receive and would in the trade receive their natural and ordinary construction, and I think the learned Counsel for the Respondents at your Lordships' Bar admitted with great fairness, and they could not have done otherwise than admit, that if the question were asked: Was there here any evidence to go to the jury of a custom placing upon these words a meaning different from their ordinary and natural meaning, the answer must be that there was no evidence of that kind to go to the jury. Therefore, I should submit to your Lordships, that that which appears to me to have been the only mode of controlling the natural construction of this contract was not a mode which was resorted to, or could be resorted to, in this case. There was nothing whatever in the evidence to go to the jury entitling the Plaintiffs to say that a construction different from the ordinary meaning of the words should be put upon the contract.

My Lords, that is the more important, as bearing upon some other observations of the Lord Justices in the Court of Appeal. Your Lordships will remember that there were in substance two applications to the Court of Appeal. One was with reference to whether the verdict should be entered for the Defendants; the other was with reference to a motion for a new trial; and with regard to the motion for a new trial on the ground that the verdict was against the weight of evidence, the Lord Justice *Mellish* thus expressed himself: "Several witnesses, and amongst them the Plaintiff himself, have deposed that they understood the word 'shipped' to mean put on board, and that the whole quantity sold must be put on board within the specified time, and no witness says that the word in mercantile usage has any other meaning; and the jury appear to have based their verdict upon a distinction which, though made by one or two witnesses, we do not think satisfactory, between contracts in which the ship is named, and contracts which may be fulfilled by delivering goods out of any ship. On the other hand, we think it is obvious on reading through the evidence, that each witness was not speaking of any real mercantile meaning which the word 'shipped' or 'shipment' bears, but was putting his own construction on the word, and, as persons who are not lawyers are apt to do, interpreted the word literally. No witness stated that he had known instances of goods rejected, and such rejection acquiesced in, when the shipment had been completed within the appointed time, because the whole of the goods were not put on board during that time; and this is the sort of evidence, which, in our opinion, ought to be given

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before the rule established by the case of *Alexander* v. *Vanderzee* (1) is departed from."(2)

My Lords, I have already referred to that case, and to the supposition that it establishes any rule; but with reference to these observations of the Lord Justice I desire to point out to your Lordships that they appear to me to be based upon a degree of forgetfulness of what really was the state of things at the trial of the present case. The Lord Justice speaks as if witnesses had been brought forward to establish a custom controlling or altering the natural meaning of the words. Had that been the case, I agree that it would have been extremely proper to examine with minuteness and with criticism the evidence so given, to look upon it with suspicion, at all events with care, as you must always do upon evidence which proposes to fix upon words a non-natural meaning or an acquired meaning. But these witnesses were not brought forward to fix upon words a non-natural or an acquired meaning. They were brought forward for the very simple and innocent purpose of saying that they had always understood that the words bore their natural meaning and had no acquired or secondary meaning in the trade. Under those circumstances I am myself at a loss to conceive how witnesses could have said anything else than that, in general terms, that was their opinion of the meaning of the words, and that was the way in which, in the course of their trade, they had always known them to be acted upon.

My Lords, that really disposes of the whole of the case. If there had been any conflict of evidence, if there had been any evidence in opposition to that given by the Defendants, your Lordships might have had here to consider whether the verdict had been satisfactorily arrived at, and whether there ought not to have been a new trial, but it being the case, and it being in fact admitted, that there was no evidence the other way, that there was no evidence to go to the jury of the words having any non-natural signification, the question resolves itself simply into the ordinary and natural construction of this contract as a document the construction of which must be placed upon it by the Court. Then, my Lords, I repeat, the case of *Alexander* v. *Vanderzee* (1) has not laid down any rule of construction applicable to the present case, and the document lies before your Lordships for you to put the natural and ordinary construction on the words. That natural and ordinary construction appears to me free from doubt and free from ambiguity, and it is a construction which will give to the contract, and must give to it, a meaning, shewing that the contract here has not been complied with, and that the goods tendered are not goods which were shipped according to the contract. I, therefore, my Lords, submit to you that the Plaintiffs have failed in making out their case. That was the opinion of the Court of Queen's Bench, before which the case came in the first instance. In my opinion, the determination of the Court of Queen's Bench was correct, and the Court of Appeal ought to have dismissed the appeal which was made from the decision of the Court of Queen's Bench. Your Lordships, if you take that view, will now hold that the Court of Appeal ought to have dismissed the appeal with costs, and you will restore the judgment of the Court of Queen's Bench. And, my Lords, acting upon a principle upon which your Lordships have already professed your intention to act in proceedings under the new *Judicature Act*, you will, I think, couple with that the awarding to the Appellants in this case the costs of this appeal.

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(1) Law Rep. 7 C. P. 530.

(2) See 2 Q.B.D. 116

LORD HATHERLEY :—

My Lords, I entirely concur in the result at which my noble and learned friend on the woolsack has arrived with regard to this case. I pass altogether from the case of *Alexander* v. *Vanderzee* (1), because, for the reasons which have been already assigned, it appears to me to be distinguishable from this case, and to have laid down no rule whatsoever which can be usefully applied to the case now to be decided.

There are traces in the evidence before us of this being a contract of no unusual character. A portion of the evidence which was given by Mr. *Robinson* with reference to the fact of there being a ship named specifically in the contract, as distinguished from cases in which the ship is not so named, shews in itself that these contracts are common. The observation he makes is this: When asked what difference the naming of the ship makes, he says: "It makes no difference as to the shipment. It takes it out of the category of the usual run of March or April shipping contracts," from which I infer that there is a "usual run" of contracts of this sort, and that a course of practice and dealing has been established which we ought to be very careful in no way to interfere with. I apprehend, my Lords, that nothing can be more unbecoming in Courts of Justice than an endeavour in any way, by any strained rule of construction, to get rid of the plain and simple effect of the contracts which they have to construe. Our duty as Judges in cases of this description, as contrasted with the duty of a jury, is this: If the contract bears a plain natural sense and meaning, nothing should make us deviate from that plain natural sense and meaning, but the strongest evidence, not of the opinion of this or that witness, but of a custom of the trade or business which forms the subject-matter of the contract, which has given an unusual, and, as it has been called by the noble and learned Lord who has addressed us, "a non-natural" meaning to the contract. No evidence of that description has been produced in this case. We have got, as it appears to me, plainly and simply to construe this contract according to the words we there find. The only word in the contract which would admit, as it appears to me, of any technical interpretation is the word "shipped." It may be well with regard to a word which was not sufficiently understood before, or with regard to words which have a special and technical force, to establish (if it can be established) upon evidence, any usage which has attributed to such words any special or peculiar force. It does not appear to me, however, that in the present case any such evidence is needed. I think the meaning of the word "shipped" is sufficiently understood by this time in commerce. But if it were needed I think we have sufficient evidence before us that by the word "shipped" all the witnesses understand put on board. I read the contract therefore as if it said "put on board at *Madras*, or coast, for this port during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874."

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(1) Law Rep. 7 C. P. 530.

Now, your Lordships will observe that it is not "*in*" the months of March $\frac{\text{and}}{\text{or}}$ April; it is not that the goods are to find themselves on board, and to be there within that period, namely, the months of March $\frac{\text{and}}{\text{or}}$ April; but it is that they are to be shipped—that is to say, to be put on board—during those months, implying a continuous act of shipping by which these goods are to be placed in the position in which they are to be placed according to the meaning of the contract. It is not surprising that a state of things has arisen upon which there might be some controversy, for this reason: owing to the distance of the district from which the goods were to come, the parties to the contract of the 17th of March could not, or did not, ascertain the exact state of things at the date of the contract; and in truth the goods which have been tendered to the Defendants were all on board at the very date of the contract itself, namely, on the 17th of March. They had been put there, therefore, of course with no reference whatever to the contract and its terms; and it is not surprising that this shipment or embarcation of the goods made before the contract was entered into, but without knowledge of the contract, should not be found to square with that instrument. The consequence is, that we have here, as it seems to me, an engagement to supply rice to the Defendants, the character of which rice was to be this: it was to be rice to be shipped during these two particular months, March and April, or either of them, and not otherwise.

Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade, those who have this "usual run," as the witness describes it, of contracts before them from time to time, and who must have pondered upon the matter, to frame their contracts in the manner which pleases them best. We must assume that it is owing to the custom of the trade that they have determined to frame them in this fashion. They do not stipulate either that the goods shall be found on board at such a time, or that the goods shall be on board before the end of the month of April; that would have been a very simple mode of expressing it, if that was what they wished; but they do expressly say that the goods shall be shipped—that is to say, put on board—during these two particular months, or one of them.

Now, the learned Judge who tried the case and addressed the jury in the first instance appears to have reasoned upon the motives which might probably have induced such a contract to be entered into; and also Lord Justice *Mellish*, in the Court of Appeal, did in some degree consider how far, in his judgment, a reason could be assigned for such a form of contract. Mr. Justice *Brett* says, in addressing the jury, that if the burden be thrown on him of construing the contract, "I construe it thus: That the meaning of it is, that if the loading has been conducted consecutively with ordinary and reasonable dispatch, and is completed in March or April, so that the vessel, so far as the loading of the cargo is concerned, may sail in March or April, that is sufficient; that is a March or April shipment." He seems there to read the contract, in fact, as I have just expressed it, as if the contract had been that the ship should be loaded before the end of April; that is the construction which, in his view of it, expressed as he expressed it, it would convey. He goes on to say, "That is, if I have to construe it, if there be no generally understood meaning of this phrase in the trade. Now, that seems to me to be the natural meaning of it—I mean in such a produce as rice—where the thing to be shipped is from a country where the produce is grown and where there is no difference in the article itself, which will itself be sent forward, whether it be sent forward in February, March, or April."

My Lords, the view that I take of the contract, I confess, is this, that it is not the article rice only that is sold, but the thing that is sold is the article rice shipped in March or April, and that the article rice shipped in February is not the article which has been purchased by the Defendants.

The Lord Justice says, in very much the same phraseology, that the word "shipped" is capable of the two constructions of meaning —either begun and finished to be put on board, or the putting on board completed in March or April. He says: "The word 'shipped' is capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a great additional burden on the seller without any corresponding benefit to the purchaser, and the consequence of adopting it would, I think, be that purchasers would, without any real reason, frequently obtain an excuse for

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rejecting contracts when prices had fallen." Now, with the greatest possible respect, and I am sure no one Judge ever entertained more respect for another than I entertain for the Lord Justice *Mellish*, I do think that that is a very hazardous way of construing a contract, namely, to say in a class of contracts having a great range, that the Judge can see, upon the face of the contract, a sufficient reason to reject what may be the literal interpretation of it, for that if such literal interpretation is to be applied, there would be an excuse afforded to parties for rejecting contracts. The danger of such a construction is extreme, because it is impossible to know all the causes which may have induced the persons to put words into a contract. If the words have a certain definite meaning, it is dangerous to depart from that meaning until you can arrive at any sound ground upon which you should do so; it is dangerous to depart from it upon a conjecture that it can make no difference to the parties, and especially you cannot reject the literal construction because you think that, unless you reject it, you may be affording an opportunity for an evasive purchaser to escape from his bargain. Of course, as has been already observed, in many cases a purchaser is desirous of escaping from his bargain, and if he finds that the bargain which is attempted to be enforced as against him, is not only burdensome upon him, but is against the letter of his contract, there is nothing in our law which prevents his availing himself of that answer to the case made against him, namely, that he has not entered into the engagement you allege, and if you seek to fasten upon him the engagement, you must first bring him within the four corners of the contract.

What Lord Justice *Mellish* says is very much like what Mr. Justice *Brett* said, namely: "The sole object of the purchaser in such a purchase as that now in question in confining the seller to a particular time within which the goods must have been shipped, is, as far as appears, that he may know when the goods are likely to arrive. That object seems as effectually attained by knowing when the shipment will be or has been completed, as by knowing when each part of the goods was put on board."(1) That is, assuming in the first place that the only object you have in view is to know when the ship may arrive, but having assumed that, it farther

(1) See 2 QBD. 115.

assumes that your object is to know the latest period at which it may arrive. Now, I apprehend my Lords, that it is important to persons entering into contracts of this description to arrange all their contracts for the whole course of the year, after the calculations they may have made as to what particular times they will be in funds to meet their engagements, and it is just as important to them to know how long it will be before the ship arrives, as to know how soon it will be that the ship will arrive. They do not wish the goods to arrive sooner than the time when they have made their arrangements for them, and they do not wish them to arrive later than the time for which they have made their arrangements. And if they have specifically named the months of March and April, they mean those two months. They do not mean to purchase goods placed on board in the previous month, February, which therefore would, or might arrive, at a different season from that at which they specially engaged by the contract to accept the goods, which goods, by the nature of the contract, are to be paid for immediately on the ship's arrival.

Well, my Lords, that really seems to me to amount to the whole case, because, as regards the evidence which has been produced in this cause, I entirely agree in what has been already said, that that evidence, if it was required at all, or if it is admissible at all, has, if anything, strengthened what appears to my noble and learned friend on the woolsack, and appears also to me, to be the natural construction of the contract. All the witnesses, uniformly, beginning with one of the Plaintiffs themselves (that is a very curious thing), and following through the rest of the witnesses, state distinctly that which the Judge, Justice *Brett*, at last put to one of those witnesses, "what you mean to say is that March is March and April is April." That is pretty much the case, and one could hardly put in a clearer point of view one's own opinion that in reality the contract is simple and easy to be construed, and that "March" in the contract does mean March, and that "April" does mean April, and that the loading "during the months of March and April" does mean a loading during those months.

My Lords, without detaining your Lordships any longer upon the case, which has been so fully and amply gone into, I am content to say that I do not think this case is at all governed by

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the case of *Alexander* v. *Vanderzee* (1), nor do I think it necessary to say anything whatever upon that case. I think it is plain upon the construction of the contract that we have before us, and I think that that contract was not performed in such a manner as that the Defendants were compelled to accept, upon the tender to them, goods which were shipped in the month of February, instead of goods which were shipped in the months of March and April, or one of them. The February shipment applied to the whole of the goods with the exception simply of the fifty bags which have been mentioned. We have it in evidence that those fifty bags amounted to four tons weight out of 300 tons, that is to say, one-seventy-fifth part of the whole subject-matter of the contract. It appears to me that the Defendants could not be obliged to accept a tender of those bags separate and distinct from the complete contract they had entered into for the whole 300 tons, the large bulk, indeed almost the entirety, of which was shipped in a different month from that which they had contracted for, and therefore was not of such a character as to be deliverable to them in fulfilment of the contract they had entered into.

LORD O'HAGAN :—

My Lords, I have reached the same conclusion, and substantially for the same reasons. I shall not repeat those reasons, or go again through facts and documents that have been already abundantly discussed. The question is of public importance, and the conflict of judicial opinion upon it shews that it is not without serious difficulty. But the grounds of decision lie within a very narrow compass, and, for myself, I shall state them in a very few words. As to the authority mainly vouched by the Plaintiff, I concur with my noble and learned friends that it is distinguishable and does not rule this case, which must be dealt with on its own special circumstances.

We have to consider a written contract, carefully prepared and deliberately acted on, the terms of which are clear and intelligible, and convey very distinctly the purpose of the parties to it. Regarded in themselves, those terms are the proper subject of construction by a Court, and not by a jury; and they appear to me fully to sustain the contention of the Defendants. Commercial usage, or the well-established understanding amongst mercantile men, may sometimes be applied to put on words, apparently distinct, a sense other than that which reasonably and naturally belongs to them. But of such a usage or understanding the Plaintiffs have given no proof whatever, leaving the words employed to the interpretation of the Court, according to their ordinary import and effect. On the other hand, the Defendants have relied on a considerable body of testimony to prove that the sense commonly attributed to the words is that which is put upon them by commercial people. This testimony, if it was needed, would be of much weight and persuasiveness. I do not think that it was. I think that if oral evidence was to be given at all, it should have come from those who wish your Lordships to interpret plain phraseology against its common import. But it is curious and striking that all the witnesses are of one way of thinking, and all of them declare that the literal meaning is the true meaning, and recognised universally as such by those whose occupations and interests bring them continually in relation with agreements of this kind.

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(1) Law Rep. 7 C. P. 530.

I thought, for a time, that there must be a re-investigation of the case, and that the verdict of the jury should be set aside as against evidence, if not for misdirection. But, having satisfied myself that the decision properly rested with the Court, and that nothing had been offered, on either side, to raise a jury issue; and deeming the words of the contract plain and unequivocal, I feel bound to adopt the proposal of my noble and learned friend, and advise your Lordships to allow the appeal.

I do not think that we are at liberty to speculate as to motives, or to consider what comparative benefit might practically have arisen from a shipment in February or a shipment in March. I can see good reason at least for the stipulation that it should definitely be in the one month or in the other. But the plain fact is, that the Defendants bargained for a shipment during March or April, and for nothing else; and as that which was offered to them was substantially a shipment of February, they were not bound to

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accept it. The appeal must be allowed with costs, and the judgment of the Queen's Bench restored.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion.

The question arises upon two contracts; they are in the same words:—[His Lordship read the words.] The first question which arises is, what was it that, according to that contract, the Plaintiffs were to supply, and that the Defendants were bound to take under that contract.

It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and a different time being (it was said) only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord *Abinger*, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at *Madras* or the coast of *Madras.* Equally good rice might have been shipped a little to the north or a little to the south of the coast of *Madras.* I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin.* But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the Defendants can be compelled to take anything in fulfilment of that contract it must be shewn not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it.

That being so, the question which arises in this case is, whether the rice here tendered was shipped within the period stipulated for or not. That evidently involves in it two questions: first, what is meant by the word "shipped" as used in this contract? and, secondly, the question of fact whether the things which are proved in evidence to have taken place as regards these Defendants did amount to a shipping of the rice within the meaning which ought to be put upon the contract.

Like my noble and learned friend on the woolsack, before saying a word about the evidence which was actually given with regard to usage and custom, I will proceed to consider what is the meaning which your Lordships should, in the absence of any evidence of mercantile usage, put upon the word "shipped" in a contract of this sort. Supposing we had no help from mercantile usage, and had nothing to guide us but that general knowledge of dealings and of what takes place which Judges judicially possess and take notice of, what would that contract mean? It seems to me that where a parcel of goods is begun to be put on board on or after the 1st of March, and they are all finally put on board so that the shipping is entirely completed before the 31st of March, and nothing then remains but to take the bill of lading for them, there can be no doubt that that is a March shipment; the whole shipment is completed in that month. But there would be a good deal more difficulty in saying whether it was a March shipment or not, if the case were this: suppose the shipment of a large parcel of goods goes on, as one transaction, which occupies several days, suppose, for example, the shipment of a large parcel of goods which may take ten days or so to put on board, has been begun before the end of the month of February, and has been proceeded with continuously with reasonable despatch, and in the ordinary way as a matter of fair dealing, and the completion of the shipment is in March although the commencement was in February, and the bill of lading is taken in March, I think the materiality of the bill of lading would merely be as evidence to shew that the shipment was then completed. I do not think that the delaying of the bill of lading for a fortnight would make the date of the shipment a fortnight later. I think the material thing is the completion of the putting it on board, which would entitle you to the bill of lading; but the bill of lading would be strong, and in most cases conclusive evidence, of the date when the shipment was really completed. I think, in a case of the sort I have supposed, there is a serious and grave question, whether or no the shipment may be considered as being made partly in one month and partly in the other, or whether it may not be considered as made at the time when the one indivisible transaction of putting those bags of rice on board was ended and completed, resulting in the whole parcel being on board, so that there is now a right to say: We have shipped this cargo, or portion of cargo, and we are now entitled to a bill of lading.

That, my Lords, was the case which arose in *Alexander* v. *Vanderzee* (1). The majority of the Court of Exchequer, the Lord Chief Baron dissenting, said that that was a sufficiently ambiguous matter to make it a proper question to ask the jury whether this was a shipment in June or not, that being the month when it ended, having begun in May. The decision was, that it was a proper case to take the opinion of the jury upon. I see that I said, standing, as far as I can perceive, alone in that respect, that without the aid of the finding of the jury I should have come to the same conclusion. I do not mean to say more about the case than this, that without saying I was wrong upon that, I have a very considerable hesitation and doubt in saying now that I was right. I pass by that case with merely that observation, and leave it as it stands.

When this case came before the Queen's Bench Division, and I had to give judgment, I could not consider whether the decision in *Alexander* v. *Vanderzee* (1) was right or wrong. Being a decision of the Court of Exchequer Chamber, it bound me, and consequently it was absolutely necessary, for the purpose of the decision there, to distinguish the case and shew that it was not the same as *Alexander* v. *Vanderzee* (1). Now, when I am advising your Lordships in the House of Lords, that is no longer so; I am not bound to say that the decision in *Alexander* v. *Vanderzee* (1) is good;

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(1) Law Rep. 7 C. P. 530.

but it is quite enough for the purpose of advising your Lordships what conclusion you should arrive at here to say, that I do distinguish the present case from *Alexander* v. *Vanderzee* (1), and that I think it is distinguishable now, for the same reasons as those for which I distinguished it in the Court of Queen's Bench, where it was absolutely necessary to distinguish it.

The facts are here that the great bulk of this rice was put on board during the month of February. For the great bulk, nine-tenths of it, bills of lading were signed in the month of February. With regard to the remaining one-tenth, a large part of that one tenth was put on board in February, but a small portion amounting, I think, to four tons, was put on board in March, and the bill of lading for the last parcel was signed in March. Under these circumstances, it seems to me, that putting aside the mercantile evidence altogether, or having none, it is quite clear that as far as regards those nine-tenths which were put on board in February, and the shipment of which was completed in February, as was indicated by the taking of the bills of lading then, it was not part of a continuous operation eked out by putting on board four tons more in March. It seems to me that it was so completely a February shipment that, had this contract been slightly differently worded, and had it said "shipped in February," instead of saying "shipped in March $\frac{\text{and}}{\text{or}}$ April," the Defendants clearly must have taken this as a February shipment—they could not have rejected it. I think that equally applies to the present case; being a February shipment it cannot be a March shipment.

I observe that in delivering the judgment of the Court of Appeal, Lord Justice *Mellish*—(and I suppose I need hardly say that every word which comes from him I consider with the greatest respect, and do not differ from, without thinking over it very much)—takes a different view of it. He says (2): "We have therefore to consider whether, having regard to the terms of the two contracts, the circumstance of several bills of lading having been signed for different parcels of rice, instead of the whole being shipped under one bill of lading, makes any difference. A bill of lading is no part of the shipping of a cargo, it is only a declaration that the cargo has been shipped and is to be delivered on certain

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(1) Law Rep. 7 C. P. 530.

(2) 2 Q. B. D. at p. 114.

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conditions." I quite agree that a bill of lading is no essential "part of the shipping of a cargo," or rather a parcel of goods, for "cargo" is an inaccurate word to use in reference to this case. A parcel of goods may be put on board a ship without a bill of lading at all; it is no necessary part therefore of the shipment. But when the question is whether there has been a shipment within a particular time or not, the fact that a bill of lading has been made out and signed is, to my mind, evidence, and until a mercantile man appears to tell me that it makes no difference, I should regard it as conclusive evidence that, as far as regards that portion of the shipment for which the bill of lading is signed, it is then completed, and is at an end. It is in that way that I consider it as being a decisive and important question, and I must say that, to my mind, the reasoning of Lord Justice *Mellish*, and the other learned Justices of Appeal who agreed with him on that part of the case, is not sound.

I think, therefore, that it comes round to this, that *primâ facie* in the absence of mercantile evidence, or the like, the true construction of the contract is that "shipped in March" bears such a meaning that the portions or parcels of goods put on board in this case in February, and so completely put on board and shipped that bills of lading were signed for them (I say nothing about the last parcel), were not March shipments, they were not shipped in March, and consequently in the absence of mercantile usage the Defendants are entitled to judgment.

As to the mercantile usage, I shall say scarcely anything upon that subject, for it really comes round to this, that the Plaintiffs did not attempt to give any mercantile evidence; they did not mean to do so. They said (erroneously, I think) the construction of the contract without mercantile usage is in our favour. The Defendants might have rested upon that, but the jury having found, as has been said in *Alexander* v. *Vanderzee* (1) that, in that particular case, there was a different mercantile meaning to the thing, they were afraid of that, and they took upon themselves to prove the negative—they took upon themselves to say, although in *Alexander* v. *Vanderzee* (1) it was said that there was mercantile usage applying to that case, we will prove, affirmatively the nega-

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(1) Law Rep. ~~3~~ 7 C. P. 530.

tive here—we will shew that there is no mercantile usage applying to this case. Now, I agree with what has been said by my noble and learned friend on the woolsack, that taking up that position you could hardly expect them to give instances of it. They say the thing was never done, and they could not give instances, When asked was it done? all they can answer is, It was never done in our experience. They took upon themselves to prove that there was no custom; nobody was trying to prove that there was a custom the other way, and I think your Lordships are not only entitled, but bound, as it seems to me, to act without regard to the question which was asked and to which no answer was given, as to whether or no there was any difference in the meaning of this contract established by mercantile usage, of which certainly no evidence was given.

My Lords, taking that view of the case, it seems to me that the judgment should be for the Defendants, as it was originally given in the Queen's Bench Division, and I perfectly agree with what the noble and learned Lord on the woolsack has proposed, that the order as to costs should now, and in future cases of the same kind, give an indemnity, and therefore include the costs in this House as well as the costs in the Court below.

Lord Gordon:—

My Lords, this is a very important question with reference to mercantile law, and it is very interesting to lawyers. I think it is one well worthy of the consideration which it has received from your Lordships.

The question is a very simple one, arising on the terms of a mercantile contract, which is for the sale of rice at *Madras*, to be shipped during the months of March $\frac{\text{and}}{\text{or}}$ April. Now, the terms which are used in these contracts are naturally the result of the intelligence of the merchants who are engaged in making them, and we may rely upon this, that they have considered well the terms of the contract before they entered into it. What your Lordships are proposing to do is to adhere to the words of the contract. These contracts are very often expressed in short terms, and therefore it becomes necessary to have evidence of custom in order to explain them. In the present case the parties who were

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the Defendants in the Court below, thought that they might better their case by leading evidence, in order to support their views by shewing the custom of trade; but the rule is clear and distinct that, where we have a written contract, the question of the construction of that contract is for the Court, and the Courts therefore do not admit evidence of custom, unless they see reason for considering that there is some dubiety in the terms of the contract. In the present case I am clearly of opinion that there is really no reason for any dubiety or ambiguity in the terms of the contract. The only words which would suggest any, are the word "shipped" and the following words, which may appear to be somewhat technical, "during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874." But there was no evidence which shewed that there was a custom of trade which would explain away the terms used, and therefore we have no question here,—really there never has been any such question in this case,—as to whether we should allow evidence of custom to be admitted in this case.

That being the case, we must construe the contract itself, according to its reasonable and literal sense, and I think we have no difficulty whatever in doing so. The safest rule in all these cases is to allow the parties who were interested in making the contract to explain themselves. It is our duty to adhere to the terms they have used unless there is raised an ambiguity which is owing to any supposed custom of trade, evidence of which might be admitted with a view to control the terms of the contract. That is not the case here, and I concur in the proposed judgment.

Judgment of the Court of Appeal reversed: Judgment of the Queen's Bench Division restored: Declared that the appeal from the Queen's Bench Division to the Court of Appeal should have been dismissed with costs, and that the Respondents should pay to the Appellants the costs of the appeal to this House.

Lords' Journal, 8th June, 1877.

Solicitors for the Appellant: *Lattey & Hart.*
Solicitors for the Respondent: *Stevens, Wilkinson, & Harries.*

[HOUSE OF LORDS.]

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June 14, 15.

DIRECTORS, &c., OF THE PRUDENTIAL ASSURANCE COMPANY . . . . . . APPELLANTS;

AND

EDMUND EDMONDS . . . . RESPONDENT.

Life Policy—"Never been heard of"—Misdirection—Bill of Exceptions.

A policy on the life of *R. Nutt* was granted in 1863. An action was brought upon it in 1874, and the question was whether *Nutt* was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, and said that they had not heard of him for more than seven years. On cross-examination, they said that a niece of his had said that when she was in *Melbourne*, in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle *Nutt*, but he was lost in the passing crowd before she was able to get to speak to him. No effort appeared to have been made to find him at *Melbourne*, and the other relatives believed the niece to have been mistaken. The jurymen expressed a similar opinion. The Judge directed the jurymen that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive and well within the last three years; and still less could they say that he had never been heard of, when all the members of the family stated that they had heard what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." And, lastly, His Lordship said to the jury, "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the Defendants." The Court of Appeal had considered this to be a misdirection, and had ordered a *venire de novo*. On appeal to this House, the Lords were equally divided, and so the decision of the Appeal Court stood affirmed.

Per LORD BLACKBURN:—When there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go.

ON 28th of September, 1863, the Appellants granted a policy of assurance on the life of one *Robert Nutt*. Mr. *Edmonds*, the

Respondent, became the assignee of that policy, and on the 16th of April, 1874, brought an action to recover its amount.

There were several pleas, of which those now material to be considered were the second, that *Robert Nutt* had not died as alleged, and the third, that satisfactory proof of the death of the said *Robert Nutt*, as required by the said policy, has not been received at the office of the Defendants, the now Appellants.

The cause was tried before Lord Chief Baron *Kelly* at the *Croydon* summer assizes, 1875, when the Plaintiff gave evidence to shew that *Nutt* had carried on business as a tailor at *Cheltenham*, failed in business in 1864, became of drunken and dissipated habits, left *Cheltenham* in May, 1867, when he was about thirty-four years of age, suffered at that time from inguinal hernia, had relations in and near *Cheltenham*, and that none of them had received any communication of any kind from him since that time. That the Plaintiff had made inquiries about him, and learned that he had gone to *Aldershott* about September, 1867, and obtained employment there as a tailor, but had been dismissed on account of drunkenness, and had then disappeared. *Alder*, a brother-in-law of *Nutt*, and Mrs. *Alder*, *Nutt's* sister, were called, and said that nothing had been heard of *Nutt* by any of the relations from the time he left. On cross-examination these witnesses said that a Mrs. *Chrieman*, a niece of *Nutt*, said that she had seen him in *Melbourne* in 1872 or 1873, but they did not believe that the man she had seen and supposed to be *Nutt* was really that person.

Mrs. *Chrieman* was called by the Defendants. She stated that she had, when a girl, resided in the same house with *Nutt*, that she was fifteen years old when he left; that in December, 1872, or January, 1873, when she was standing in a crowded street in *Melbourne*, a man passed her whom she recognised as her uncle *Nutt*; he was well dressed, and apparently well to do. She did not speak to him, as he was lost in the crowd when she turned to do so. She wrote of this to her mother, and on returning to *England* in 1873 told her relations at *Cheltenham* that she had seen her uncle.

The jurymen, through their foreman, thereupon stated to the Lord Chief Baron that they did not consider this evidence as conclusive that she had seen her uncle. Mrs. *Chrieman*, senior,

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was then called, and proved that she had received a letter from her daughter in which the seeing of *Nutt* was mentioned; Mrs. *Chrieman*, junior, did not appear to have made any inquiries at *Melbourne* about *Nutt*.

The counsel for the Plaintiff called on the Lord Chief Baron to direct the jury that there was evidence that *Nutt* had been absent for above seven years without being heard of, and that he had not been heard of if Mrs. *Chrieman*, junior, was mistaken; and if the jury, from the improbabilities of the case or otherwise, believed her to be mistaken, then *Nutt*, having been absent for above seven years without being heard of, must be presumed to be dead. But the Lord Chief Baron gave the following direction to the jury:—

"'Not being heard of' means this, that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more. You cannot say that a man has never been heard of, when, in the first place, one of his nearest relations actually comes and says she saw him alive and well within three years; still less can you say that he has never been heard of, when every member of the family states that they heard that which is now stated. You cannot have any one called before you who saw him die or saw him buried. You have, therefore, no direct evidence except the evidence that he was alive two or three years ago; on the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive in 1872 or 1873. I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead, but the very ground of the presumption, which sometimes arises, of death, from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence that every relative he had at *Cheltenham*, or, so far as we know, in the world, has heard that he was alive. Then, when you come to ask yourselves the question, whether what they heard was what ought to have satisfied them, at the

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least, that he might be alive, you have before you a person on whom no one pretends to cast any reflection, whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject, and that she saw him and knew him, and that it was her uncle *Robert Nutt*.

"Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the Defendants."

The jury thereupon gave a verdict for the Defendants. The Plaintiff's counsel excepted to the direction, and a bill of exceptions, containing the above form of direction to the jury, was prepared and duly signed and sealed by the Lord Chief Baron.

The case was taken to the Court of Appeal, where the Master of the Rolls, Lord *Coleridge*, and Mr. Baron *Pollock* agreed that the case must go down. The Defendants in the action then brought this appeal.

Mr. *J. C. Day*, Q.C., and Mr. *Morgan Howard*, Q.C. (Mr. *Harben* was with them), were for the Appellants, and

Mr. *R. B. Finlay* (Mr. *Benjamin*, Q.C., was with him), for the Respondent.

Doe d. *Knight* v. *Nepean* (1), *Doe* d. *George* v. *Jesson* (2), *Doe* d. *Lloyd* v. *Deakin* (3), *Doe* d. *France* v. *Andrews* (4), were cited.

LORD HATHERLEY:—

My Lords, this case turns upon a very short question, namely, whether or not in directing a jury, the jurors were misdirected by the learned Lord Chief Baron who tried the case, and as to whose direction a bill of exceptions was tendered, which he signed. It is greatly to be regretted that in determining this case, which, probably, all things being considered as regards the findings and the other parts of the case, is not of so much importance as one might otherwise have supposed—I say it is greatly to be regretted that we have so meagre and imperfect an account of the summing-up. I can hardly believe that what we have in the papers before us is all that was said on the occasion. At the same time, if it be not all, there was an opportunity given to the learned Judge who signed the bill of exceptions to add to it and have it put into proper shape, and we are obliged for the purposes of this case and upon this hearing, to assume that we have everything before us which ought to lead us to a conclusion.

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(1) 5 B. & Ad. 86 (S. C. *nom. Doe* d. *Slade* v. *Nepean*, 2 Nev. & M. 219), 2 M. & W. 894. As to presumption of death and the time of its happening, see also *Hickman* v. *Upsall*, Law Rep. 20 Eq. 136; 4 Ch D. 145.

(2) 6 East, 80, at p. 85.

(3) 4 B. & Ald. 433.

(4) 15 Q. B. 756.

That being so, my Lords, the question which arises is this: An insurance was effected by the Plaintiff in the action upon the life of a person of the name of *Robert Nutt*, and the insurance money was claimed as upon his death by the Plaintiff in the action (the Defendant in Error) from the *Prudential Assurance Company*, who are Plaintiffs in Error. Of course it was the duty of the Plaintiff in the action to establish as such Plaintiff, the fact of *Robert Nutt* being dead, before he could claim the insurance money upon his life. The course the Plaintiff then took was to prove that upon inquiry amongst the relatives and friends of *Robert Nutt* he had not been able to learn any tidings of him, and that none of the family had heard of him for a space of seven years past, upon which, if the case rested there, if recourse had really been had to all the family whom the Court might conceive proper to be inquired of in respect of such a matter, and if none of them had heard or known anything of *Robert Nutt* for the space of seven years, the presumption of his death would have arisen. I do not think it necessary or important in the present inquiry to determine the precise words in which the law should be laid down as to this absence of knowledge. If we look to the analogy of the various Acts of Parliament, which, on various occasions, have been passed for the purpose of laying down that rule of presumption, I think in all those instances to which we have been referred, the expression is, if the party "had not been known to be alive" during that time. The learned Judge here has laid it down, and it does not seem to have been questioned in the Court of Appeal, that if the relatives had heard of the person as being living whose death was in question, that would have been sufficient to rebut the presumption. I am willing to take it to be so for the purposes of the present inquiry. I do not think in the present inquiry it would make any difference.

Different members of the family were called as witnesses, and I think I may state very briefly what the result of the evidence came to be. Several witnesses were called, who, when you take the whole of their evidence into consideration, say this: *Robert Nutt* was our relation; we heard of him last more than seven years ago; we have never heard anything of him since, except that we were informed by one of the family, a Mrs. *Chrieman*, that she had in a distant country, in *Australia*, seen this man who was her uncle; that she had said, that upon a particular occasion she saw in *Melbourne* a man passing by "whom she recognised as her uncle *Robert Nutt*, he was well-dressed and apparently well-to-do, and resembled her uncle as she remembered him in *Cheltenham;* that she did not speak to the man because he was lost in the crowd as she turned to do so; and that she had on returning to *England* in 1873 told all her relations in *Cheltenham* that she had seen her uncle *Robert Nutt*." I read the evidence of the different witnesses as saying, We never heard of him except by this information.

The jurymen before considering their verdict stated to the learned Lord Chief Baron, as appears in the case put before us, that they did not consider that the evidence of Mrs. *Chrieman* was conclusive that it was her uncle *Robert Nutt* whom she had seen. Thereupon the Defendants called the mother of this Mrs. *Chrieman* and also Mrs. *Chrieman*, junior, herself. The mother said that her "daughter had written to her a letter in which she stated that she believed that she had seen her uncle *Robert*." It appeared that "no inquiries were made in *Melbourne* by Mrs *Chrieman*, junior, or by the other relations, for the purpose of tracing the person supposed to be *Robert Nutt*." I think I may fairly represent the evidence to come to this: none of the relations except Mrs. *Chrieman* had seen *Robert Nutt* for seven years, and none of them had heard of him during those seven years, except so far as they had heard of him from her; and in reality the case may be reasonably stated as being one which turns wholly on the evidence of Mrs. *Chrieman*. There is, first, the question whether she was to be believed as honestly stating that she saw her uncle? I see no reason, so far as anything appears in the proceedings, for thinking that she was not honestly stating that; her writing to her mother seems as if she believed, at least, what she was saying. And there is, also, the question whether she might not be mistaken in supposing that she had seen her uncle, as to whom she made no farther inquiry.

My Lords, in that state of the case the counsel for the Plaintiff asked (and this is very important) "the Lord Chief Baron to direct the jury that there was evidence that *Robert Nutt* had been absent for seven years without being heard of, and that he had not been heard of, if Mrs. *Chrieman*, junior, was mistaken in believing that she had seen him; and that if the jurors were satisfied, from the improbabilities of the case or otherwise, that Mrs. *Chrieman*, junior, was mistaken in believing the said person seen by her in *Melbourne* to be *Robert Nutt*, then the said *Robert Nutt* might be presumed to be dead, having been absent for more than seven years without being heard of." Now, I apprehend that that mode of putting the case to the jury, which the learned counsel so asked the Lord Chief Baron to adopt, was a perfectly correct mode of stating it, and that, in truth, the case did turn upon this, and wholly upon this, whether Mrs. *Chrieman* was to be trusted or not in the account which she gave of having seen her uncle. If the jurymen were satisfied that she had seen him, without mistake in judgment or disposition to state a falsehood, there was an end of the case at once. If, on the other hand, the jurymen, for this was a question entirely for the jury to determine, came to the conclusion that she was mistaken, and that she had not seen *Robert Nutt*, then, also, the case was at an end, for the other relations who gave evidence had never heard of him for seven years. They said they had not heard of him apart from this statement, which they disbelieved. They said they did not think this statement to be a correct statement, and they were not satisfied by it; and, certainly, if the jurymen came to the conclusion that it was not to be depended upon, they would be justified in saying that the man had not been heard of for seven years. Therefore, the question as to the presumption of death in this case appears to me clearly to stand in this way: If, on the one hand, the evidence of Mrs. *Chrieman* was believed, there was clear and distinct evidence that the man was alive within seven years, and there was an end of the case. If, on the other hand, it was not believed that what she stated was a correct statement of fact, then there was clear and indisputable evidence that the relations had not heard of him within seven years in any way in which the term "heard of him" could be reasonably understood and applied; that is to say, as meaning something more than a hearing of that which could be treated, as they did treat it, as inaccurate—a piece of mere gossiping suggestion. If the jurymen took that view of it, they must be held to have been justified in coming to the same conclusion as the relatives did, and the result would be that *Robert Nutt* had never been heard of at all for seven years. Only one person came forward and said that she had seen him, and she had not heard of him otherwise. On the other hand, every other member of the family who was called in the case had never seen him for seven years, and had never heard of him except by this statement, which, if disbelieved, the jury would be bound to say that he had not been heard of.

Now, my Lords, the learned Chief Baron directed them thus: "Not being heard of means this, that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more." I will not stop to criticise that particular expression. I agree with the learned Judges in the Court below, that it is not fair to criticise every line and letter of a summing-up which has been delivered by a Judge in trying a case, especially where there is a somewhat imperfect record of it. But he goes on to say: "You cannot say that a man has never been heard of when, in the first place, one of his nearest relations comes and says she saw him alive and well within three years; still less can you say that he has never been heard of, when every member of the family states that they heard that which is now stated." There, my Lords, as it appears to me, a difficulty arises as to the direction given by the learned Lord Chief Baron to the jury. As far as I have read his direction, it seems to me to come to this: in the first place, if the jurymen believed Mrs. *Chrieman's* assertion to be correct, and thought that she had seen him alive and well, of course that ends the case. But then he adds, "Still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated." Now, as far as that extends, if it remained there, there would have been great reason for the jurymen to infer from that direction that it would be impossible for them, whatever might be the value of Mrs. *Chrieman's* evidence, to consider the presumption as arising when every member of the family had heard what she said, because, be it true, or be it not true, the fact of their having heard it would prevent the presumption arising.

I think that would be the reasonable inference from that language ; but I think it becomes clearer, as you go on, that that would be the interpretation that would force itself upon the mind of the jury, because what the learned Lord Chief Baron goes on to say is this : " You cannot have any one called before you who saw him die, or saw him buried. You have therefore no direct evidence except the evidence that he was alive two or three years ago ; on the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive." Therefore it appears to me that the Lord Chief Baron plainly and distinctly directed the jurymen that they had no evidence before them at all upon which the presumption of law could arise, because the presumption of law requires that those relatives should not have heard of him, and you find that all those relatives did hear of him. Of course, in reality that turns upon whether they believed Mrs. *Chrieman* or not, and whether the relatives having heard of him from her, they were bound to accept that as knowledge, and so the presumption of death should be disposed of. On the other hand, my Lords, I apprehend that that is not the law at all. That would not be such a hearing as could lead you to a reasonable ground for believing that the man was alive within the epoch. I apprehend, my Lords, that the jurymen are not here directed, as it appears to me they ought to have been, that the evidence given by the members of the family as to not having heard of him was fit to found the presumption upon, if they came to the conclusion that

Mrs. *Chrieman's* story was not to be believed. On the contrary, it seems to have been laid down in clear and precise terms that if every member of the family has heard of him, whether by a credible story or not, then there is a probability of his being alive and the presumption of death would not arise.

The learned Lord Chief Baron goes on to say: "I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead, but the very ground of the presumption, which sometimes arises, of death from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence." What evidence? Not that he was alive, but "that every relative he had at *Cheltenham*, or, so far as we know, in the world, has heard that he was alive." So that there again the jurymen are told, and as it seems to me emphatically told: When you find the whole family declaring that, in this way, they have heard that he was alive, there is nothing to justify the presumption of death, every ground for the presumption which sometimes arises has disappeared. Then he proceeds to use an expression which was commented upon by the learned counsel in the short and able argument, all the abler perhaps because it was short, which was addressed to your Lordships yesterday. We come now to a part of the summing-up which approximates to informing the minds of the jurymen a little more of what their function was. He says: "Then when you come to ask yourselves the question" (that assumes, of course, that they had to determine the question) "whether what they heard was what ought to have satisfied them at the least that he might be alive, you have before you a person on whom no one pretends to cast any reflection, whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject, and that she saw him and knew him, and that it was her uncle *Robert Nutt*." That, coupled with the preceding part, I am bound to say, was the only part which made me feel any hesitation in the conclusion that I have come to. That seemed to indicate, although I told you (the jurymen) that there was no presumption whatever in consequence of the relatives having heard this, there yet remains the question to ask yourselves whether what they heard ought to have satisfied them. If that stood alone without the passages coming before and after it which I have read, or am about to read, I should have been disposed to come to the conclusion that the matter had been properly left to the jurymen, and that they might have arrived at the consideration of whether or not they believed the evidence of Mrs. *Chrieman*, or whether or not her statement was such that it ought to have induced the other relatives to believe that the man was seen within the particular epoch.

But, my Lords, observe what the Lord Chief Baron says as concluding the whole: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary" (that is, of course, that Mrs. *Chrieman* had seen him), "and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the Defendants." Now the evidence was not absent, the evidence was all present of his not having been heard of in that time, for all the relations say they never did hear of him except in this particular way, which they did not believe—whether they were right or wrong in that is another question. Therefore, the learned Judge having used the strong expressions which I read at the beginning about the absence of all evidence, again repeats here that there is no evidence whatever upon which a presumption could arise; he says, "in the absence of that evidence upon which alone the presumption should be raised."

Upon that, my Lords, I come to the conclusion which was so well expressed, I think, by Mr. Baron *Pollock:* "It may very well be that the jury, upon the particular words used by the Lord Chief Baron, may have thought, quite apart from the credibility of this witness, they were bound, by reason of the relatives having heard something at *Cheltenham*, to act upon the question of presumption, which, as I have said before, is a question of mixed law and fact." I confess, my Lords, it appears to me, with these passages which I read from the summing-up, and from the concluding passage, that the impression left upon the minds of the jurymen would necessarily be that they had no evidence whatever before them upon which the presumption could arise, in consequence of the relatives having heard that statement, which might reasonably have led them to the conclusion that *Robert Nutt* might be alive, if what Mrs. *Chrieman* said was true. My Lords, I confess, looking at the whole case, and having regard to what has been found on other parts of the case for the Defendants, I regret extremely to be obliged to come to this conclusion, for I am afraid we are not in any degree assisting the parties in arriving at a very helpful arrangement as to their rights. Unfortunately your Lordships are, I believe, divided in opinion upon this subject, but I can only express my own opinion, which I confess I have come to, not so much with hesitation as with regret; and if the result should be that your Lordships should be equally divided, of course there will be no reversal. Following the precedent of a former case, I shall not be disposed to advise your Lordships to give costs of the appeal in such a case.

LORD O'HAGAN:—

My Lords, I confess that in this case I am not able to concur with my noble and learned friend. I need not say that I feel the greatest diffidence in any case where I happen to take a view different from his, and I feel it equally in differing from the view which I believe is taken by my noble and learned friend opposite (Lord *Blackburn*) of this case. I have come to the conclusion that the judgment of the Court below ought to be reversed. I will add that I have the greater difficulty in this case, because, on looking to the judgments delivered in the Court below, I find that the learned Judges may substantially be said to have been equally divided there also. The Lord Chief Justice of the Common Pleas, although formally he accepted the opinions of his colleagues, substantially differed from them upon the point, so that we have on the one side the Lord Chief Baron and the Lord Chief Justice of the Common Pleas, and on the other side the Master of the Rolls and Mr. Baron *Pollock*, and both of those who have affirmed the judgment of the Court, have affirmed it with an expression of the strongest hesitation upon a consideration of the case.

My Lords, I confess that I concur very much with the observations which were made by those learned Judges as to the unfortunate manner in which this case is placed before us. We have a

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bill of exceptions, which sets out a few sentences out of a long summing-up (we are informed by the learned counsel that it extended to beyond an hour in the delivery), and we have those sentences strung together in such a way that they are not everywhere perfectly intelligible. The misfortune of that is, that we really cannot have any assurance that we have before us the words, in their collocation and effect, which the Lord Chief Baron actually used to the jury. I concur also, my Lords, with the view of the learned Judges in the Court below, that in dealing with a bill of exceptions of this sort, especially such a bill of exceptions as is before us now, we ought not to be hypercritical with reference to the Judge. It is quite true, as my noble and learned friend has said, that we are bound within the four corners of this bill of exceptions, and if the Judge or the counsel had any desire to add anything to the bill of exceptions, it was perfectly competent to them to do so before it was signed. But, on the other hand, we cannot shut our eyes to the fact that this is a most imperfect record of what passed at the trial; and therefore at once we must not be hypercritical in regard to the Judge, and we must be slow to disturb a verdict which was pronounced deliberately by a special jury of the county of *Surrey*, presided over and addressed by a learned Judge of such great experience, and coming to this conclusion upon the evidence placed before them. If we see clearly that there was misdirection in the case, and that the jurymen were misled, directly or indirectly, by the learned Judge, our bounden duty is to disturb their verdict; but if we do not see that clearly and distinctly we should rather lean to a maintenance of the verdict than to a disturbance of it.

My Lords, I need not say that we have nothing to do in this case with the weight of evidence. Nor have we anything to do with the particular form of expression in which the learned Judge addressed the jury. I am free to say that the expressions used by the learned Judge were very strong indeed, and I am not indisposed to admit, with one of the learned Judges of the Court of Appeal, that the jurors may to some extent have thought those expressions strong enough to coerce their judgment upon the question before them. But it does not at all follow from that, that we are to allow the bill of exceptions. I myself have had

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some practical experience as a Common Law Judge, and I know that some Judges have thought it right to balance the evidence on questions which juries have to consider on the one side and on the other, and to leave the jurors, who are constitutionally the judges of fact, to draw their own conclusions; but I am aware, also, that other Judges, and I should infer from this bill of exceptions, although I know nothing of his practice otherwise, that the learned Lord Chief Baron is one of them, who think it to be their duty to direct the juries as well as they can upon questions of fact as upon questions of law; not to coerce them, but to give expression to their own opinions in clear words, and if those expressions of their opinions in clear words do lead the jury to conclusions in accordance with the conclusions of the learned Judge, the Judge is the better pleased with that, and very often the jurymen are none the worse for it. Therefore, although there are very strong expressions in this charge, yet inasmuch as the reference of a matter to the judgment of the jury must very often be an understood reference and not an expressed reference, I take it that upon the whole that is no ground upon which we can set aside the verdict or maintain the bill of exceptions.

Now the question is, what did the learned Lord Chief Baron say to the jury? Manifestly the real question in the case was a single question. The Plaintiff insisted upon the legal presumption of the death of *Robert Nutt* after a certain number of years. The answer of the Defendants was, We do not deny the number of years which have passed, and all that, but we call a witness to prove that the person alleged to be dead, this *Robert Nutt*, was alive two years ago. That was a question for the jurors, and if that question was left to the jury, and if the jurors, when they had that question left to them, found their verdict accordingly, we have no right to interfere with that verdict at all. The solitary question we have to determine in the case is, did the Lord Chief Baron leave to the jury the question as to the veracity and the accuracy—I may say mainly the accuracy—of Mrs. *Chrieman's* testimony? If he did leave that question to the jury, then I say that his direction to the jury ought to be maintained by your Lordships.

Let us see what he really did say upon the matter. I begin with the statement of "the jury through their foreman" "to the Lord Chief Baron in the course of the case that they did not consider that the evidence of Mrs. *M. L. Chrieman* was conclusive that it was her uncle" whom she saw. Now I observe upon that, that that single circumstance indicates the jurymens' full appreciation of their power and their duty in the case. They knew it to be cast upon them to determine upon this question, and they knew precisely the question they had to determine. What followed upon that? They expressed a doubt. Then the learned counsel, whose interest it was to uphold the testimony of this woman, produced her mother, "who stated that her daughter had written to her a letter, in which she stated that she believed that she had seen her uncle *Robert*." I do not know how it came to pass that that letter was admitted in evidence at all. It appears to me not to be evidence. There are certain very exceptional cases in the law, especially in the criminal law, in which the statement of a person immediately after a transaction has occurred, is permitted to be given in evidence for the purpose of affirming the accuracy and the truthfulness of the other evidence given. That is the case in the instance of rape, and in the instance of felonious assaults, and some other, but very few, cases in the whole range of the law. I confess if I had been trying the case I do not think I should have admitted this particular piece of evidence at all. I do not think it was evidence; but it was admitted, and, being admitted, it was morally persuasive although legally exceptionable. It was very morally persuasive if, in a letter so produced, the woman immediately after the period when she said that she saw her uncle, made a clear, coherent, probable, and seemingly truthful statement to her mother; and when they got the evidence before them, no doubt that very naturally operated very much upon the minds of the jurors, and led them to the conclusion which they afterwards affirmed by their verdict that this woman had seen her uncle.

Then the counsel for the Plaintiff called upon the Lord Chief Baron to give a specific direction to the jury "that there was evidence that *Robert Nutt* had been absent for seven years without being heard of, and that he had not been heard of if Mrs. *Chrieman*, junior, was mistaken in believing she had seen him, and that if the jury were satisfied, from the improbabilities of the case or otherwise, that Mrs. *Chrieman*, junior, was mistaken in believing the said person seen by her in *Melbourne* to be *Robert Nutt*, then the said *Robert Nutt* might be presumed to be dead." Now, in the hearing of the jury the learned counsel made that very proper appeal to the Judge, and by so doing informed the jurors, as the Judge, I think, substantially informed them afterwards, that it was their province, and not his, to determine whether Mrs. *Chrieman* was right or wrong, whether she was mistaken or correct in what she said upon this matter.

I pass on, then, to what the learned Lord Chief Baron actually said. There is no controversy raised upon the first sentence. I think my noble and learned friend now on the woolsack, although he criticised it more or less, did not make any objection to this first sentence with regard to what "heard of him" means. He goes on to say, having defined the nature of the presumption, "You cannot say that a man has never been heard of when in the first place" (now observe this) "one of his nearest relations actually comes and says she saw him alive and well within three years." If it had stopped there, beyond all doubt there would have been no controversy about the matter, at least I think there ought to have been none. He says: "You cannot say that a man has never been heard of when, in the first place, one of his nearest relations actually comes and says she saw him alive and well within three years; and, he adds, "still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated." Now, no doubt, if that stood alone it would be exceptionable, but in my opinion you must take the whole sentence together. You must take the reference to the existence of the man as proved by the woman, and you must take the belief of the family as founded upon her statement, which the jurymen were required to declare to be right or wrong. Taking the two together it does not appear to me to be an unreasonable conclusion that the jury, after listening to that charge, would not have hesitated to say, It is our duty first to determine whether we believe Mrs. *Chrieman* to have been mistaken or not. I confess for my own part, although I admit that there is some confusion in the case as to this part of it, and I admit that that naturally produces the diffidence and hesitation which every one who has been connected with the judgment of this case has declared he has felt, still looking at it as a matter of common sense, and taking the whole of this sentence together, I think the jurors must have seen that it was their primary duty in the first place to determine as to the credibility and correctness of Mrs. *Chrieman's* statement.

Then the Lord Chief Baron goes on: "You cannot have any one called before you who saw him die or saw him buried." That is not so very clear, but it does not touch the case. Then he says: "You have, therefore, no direct evidence except the evidence that he was alive two or three years ago." Now no doubt that looks very like an assumption by the Lord Chief Baron that that evidence was infallible evidence, and was to be accepted; but you must take that in a reasonable way, and take it in connection with what follows afterwards. What he says substantially is this—there is direct evidence, if you believe it, that he was alive two or three years ago. And then he goes on: "On the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward and every one of the relatives heard that he was alive in 1872 or 1873." Now how did they hear that? Merely through Mrs. *Chrieman.* She was the only channel of information on which their hearing was founded at all, and the same observation, if there was any force in it, that I have made about the antecedent sentence will apply equally to this. Then he goes on to say: "I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead," that is to say, if you believe this woman; I believe her, and therefore I see no evidence that he was dead; I see evidence directly to the contrary, "but the very ground of the presumption, which sometimes arises, of death from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence that every relative he had at *Cheltenham*, or, so far as we know, in the world, has heard that he was alive." Again I say if that stood alone the mere hearing that he was alive would plainly not be evidence upon which the jury could act in the case at all; but when you connect that with the statement that they had heard he was alive from a woman whose accuracy and correctness at that moment they were to determine on—putting the two things together it appears to me quite possible (and that is sufficient to say) that the jurors may not have been misled at all by the collocation of words which may be unhappy, may be inartistic, and may be obscure, but which I do not think in any way necessarily led them to an erroneous conclusion.

Having got so far it appears to me that what remains, I do not say makes it clear, that is impossible after what we have heard from my noble and learned friend, and from the learned Judges of the Court below, but gives colour and reason to the view which I feel myself compelled to take of the case: "Then when you come to ask yourselves the question, whether what they heard was what ought to have satisfied them, at the least that he might be alive." What is the meaning of that? "What ought to have satisfied them," that is to say, was it a true statement made by a woman who actually saw the thing to which she was prepared to depose. "You have before you a person on whom no one pretends to cast any reflection, whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject." Now I pause there. The learned Lord Chief Baron says that the jurors have before them a person unimpeached by any one, and they were to consider manifestly whether they held that woman unimpeachable, not only in integrity but also in accuracy of statement. He put before them that woman as the subject-matter of their inquiry upon the occasion. And not only so, but he shews by the succeeding words that the question of her correctness has been made a substantial question before the jury, before that period of the trial. The question arose when that letter was produced by her mother. It is one of the great misfortunes of the case that we are in darkness about all the facts, but I take it that that letter had been alleged to be discrepant with the statement which she made when called as a witness. That may have been the case, but the value of it is to shew before the jury the accuracy of that woman by a comparison with her letter. That question had been before the jury, and was considered by the Court and the jury, both, to be the real question for their determination.

The Lord Chief Baron continues: "Whatever may have been the language in which she made the communication she made to the relatives, who now states positively on her oath that she has no doubt on the subject, and that she saw him and knew him, and that it was her uncle *Robert Nutt.*" My noble and learned friend I think has very truly said that if that stood alone it would be scarcely possible to impeach the charge. It does not stand alone unfortunately, and therefore the controversy arises, but I read it as throwing a light back upon what went before, and as concentrating the attention of the jurors upon that which had previously been put before them in a scattered way, and clearly suggesting to their minds the very issue upon which they were required to determine, taking away from them any excuse for assuming any other issue than the real one, which was the correctness and the veracity of this woman. That was the question put ultimately in these words by the learned Judge to the jury, and I think I am not wrong in saying that I may interpret what went before, as the jury probably did interpret and ought to have interpreted what went before, as making clear that which was obscure, and plain that which was doubtful.

But my Lords the matter does not rest there. It appears to me, I confess with the greatest deference to my noble and learned friend on the woolsack, that the last sentence is of equal force in support of the view which I venture most humbly to suggest to your Lordships. It is this: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875." Who are to find? And what are they to find? The jurymen are to find whether the man was alive or dead in April, 1875. They are to find that, and although the Judge has said, and said in a very magisterial and peremptory way certainly, what he thought about it, he at the end of the case tells them what he was constitutionally bound to tell them, namely, that they, and they only, were at liberty to find anything upon the subject. He goes on after saying, "unless you are prepared to find that he was dead in April, 1875," to say, "and find it upon evidence which tends to

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prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the Defendants." What is the meaning of that? It is in my opinion substantially what had been said by the antecedent clause. When he says, "in the absence of that evidence," that means in the absence of evidence of not hearing of the man, or the man's existence, you would be able to make that presumption, but you cannot do that because there is no such evidence of want of hearing of him, for, if you believe this woman, Mrs. *Chrieman*, the man was seen two years ago, and, therefore, if you believe her, there could be no presumption of death at all.

My Lords, as I have said, I have felt the greatest difficulty in the matter. I have great doubt considering the difference of opinion there has been here and elsewhere; but upon the whole it appears to me that the learned Judge did substantially, although in obscure and imperfect terms, put to the jury very much the question expressed as the proper question by the Master of the Rolls, who (it is worthy of observation) says he does not impeach any particular part of this charge; he does not pick out any sentence or any words, but, reading the whole of it, the impression on his mind is so and so. I am not clearly of opinion that that is precisely the way in which one ought to deal with a bill of exceptions. I rather think it is not. But be it so or not, the way in which he states the question which should have been put to the jury is this: "If you think that Mrs. *Chrieman* was mistaken, then the man has not been heard of—if you think she was not mistaken, but she did see her uncle, then he has been heard of, and that is the question for your consideration." I may be right, or I may be wrong, but I have read this bill of exceptions over as often as the Master of the Rolls since we heard the argument yesterday, and I have come to a directly opposite conclusion. I think that substantially that was the question which was put to the jury, and I have no moral doubt in my mind that the jurors, who at the beginning of the case had applied their minds to that very question, and considered that question, and had afterwards modified their opinions upon that question, had, at the end of the case, that question fairly before them, and came to a deliberate conclusion upon it. That conclusion was to defeat the Plaintiff, and I think the Plaintiff ought to be defeated. I believe my noble and learned friend at my side (Lord *Gordon*) is of my opinion, and therefore we are equally divided, and the judgment must stand, but I think with my noble and learned friend on the woolsack that with a view to uphold a decision we came to last session there should be no costs of the appeal.

LORD BLACKBURN:—

My Lords, I also regret that upon the construction of this inartificially drawn bill of exceptions there should be a difference of opinion among your Lordships. I take it that the Court of Appeal having held upon this bill of exceptions that there should be a *venire de novo,* if your Lordships are equally divided, as I believe you are, the result of the judgment will not be disturbed, but that no costs will be given of the appeal to this House.

My Lords, I now proceed to say why, as far as my opinion goes, the judgment of the Court of Appeal ought to be affirmed with costs. I think it was right. I take it that when there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary for him to go. It is a mistake in practice, and an inconvenient one, which very learned Judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise upon the case. That is not the duty of the Judge at all, and I think it is better not to do it. So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the Judge should state it; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo.* When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo.*

My Lords, in the present case I feel some regret in saying that there should be a *venire de novo,* for as far as I can make out the case, the verdict was quite right. But I cannot help that; if an improper direction has been given, a wrong guide has been given to the jury. That raises the question upon the construction of the bill of exceptions—what was the direction given by the learned Chief Baron to the jury? Was it right, or was it either wrong as giving a wrong guide, or imperfect as not giving a right guide, when the circumstances made it his duty to give the jury a guide? The question comes before us upon a bill of exceptions, and that is a very inconvenient mode, and it is now a very unnecessary mode of raising it. At the time when the statute under which the bill of exceptions proceeds was passed, now four or five hundred years ago, there was no way of bringing error upon a misdirection of a Judge at *Nisi Prius*, and therefore it was directed that when he gave his direction the counsel if they thought it erroneous might take exception to it, and if one of the counsel did so it was necessary for him to state it:—[His Lordship stated the ordinary proceedings on a bill of exceptions, and remarking on what had been done in this case, said that it was "essential that exception should be taken before the verdict was given."] We must now take the bill of exceptions as it is, and look at the whole bill of exceptions and see, has or has not the Lord Chief Baron upon that bill of exceptions and according to the statement therein contained, done (whether he actually did it or not we do not know) what he ought to have done, or has he failed in his duty to give the jurymen a proper guide in law to enable them to determine the question which was before them?

Looking at the bill of exceptions as it now stands, we find the facts to be these: *Robert Nutt's* life was insured; the question was, was he to be considered as dead or not? The Plaintiff had failed in proving the actual death of *Robert Nutt*, and then he relied upon the rule of law which is generally laid down in something like these terms; if a man has not been heard of for seven years that raises the presumption that he is dead. It is generally so enunciated. I do not say that that is the correct way of enunciating it, but I think it may be fairly enough put in those words for this purpose. I think, having regard both to the reason of the thing and the decisions, we must take "not being heard of" in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, "I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years." But that would not be enough to raise a presumption that he was dead, because, if ever so much alive, those people might not have heard of him. My Lords, it appears from the case of *Doe* v. *Andrew* (1) that it is necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man amongst those who, if he was alive, would be likely to hear of him. Perhaps it is not quite an analogy, but it is something like the case of a search for documents; before you are allowed to give secondary evidence of a document you must search the places where the document would in the natural course of things be, if it were still in existence; and, having proved that you have done that, you may then give your secondary evidence. In like manner, in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those who, if he was alive, would be likely to hear of him, and see whether or no there has been such an absence of hearing of him as would raise the presumption that he was dead.

In this case the Plaintiff undertook to do that, and called first a witness who said so, but afterwards said that he "had heard a report that a Mrs. *Chrieman* had seen him" in *Australia*, but that he did not believe it. I am inclined to think that having heard a report would hardly be such a matter as would prevent the fact of the witness saying he had not heard of him being evidence as far as it went. The next witness states that she had not heard of *Nutt* since he left *Cheltenham*, but that Mrs. *Chrieman* had told her that she believed she had seen him in *Melbourne*. There the Plaintiff's case ended. Had the objection then been

(1) 15 Q. B. 751.

taken, This does not raise the presumption, for, when you make a search among those who, if he were alive, would have been likely to hear of him, as to whether he had been heard of or not, it appears that Mrs. *Chrieman* did say that she had heard of him—that she had seen him—and then the presumption would not arise. The proper ruling, if that objection had been taken at the end of the Plaintiff's case, would have been, there cannot be said to have been no hearing of him for seven years, for Mrs. *Chrieman* says she saw him, and I think that would be a hearing of him in every sense of the word. The Plaintiff might have met that by calling Mrs. *Chrieman*, to prove, if so he could, that although she had said she had seen him, that was founded on a mistake. If that could have been done, I think it would have been open to the Plaintiff to do so. I dare say the learned counsel for the Defendants judged very wisely upon the matter; instead of making a captious objection, to compel the Plaintiff to call Mrs. *Chrieman* the younger, he said I will call her myself. I know what she is going to say, and it will be better for me before the jury that I should do so. He was very discreet, probably, in so doing. The Defendants having called her, she says she was fifteen years old when *Robert Nutt* left *Cheltenham*, and that in December, 1872—that is, four or five years afterwards—she being then twenty years old, "when she was standing in a crowded street in *Melbourne*, in *Australia*, a man passed her whom she recognised as her uncle *Robert Nutt*; that he was well dressed, and apparently well-to-do, and resembled her uncle as she remembered him in *Cheltenham*; that she did not speak to the man, because he was lost in the crowd as she turned to do so; and that she had, on returning to *England* in 1873, told all the relations in *Cheltenham* that she had seen her uncle *Robert Nutt*."

Then a juryman stated a thing which occurred to him. He stated "to the Lord Chief Baron that they [the jurymen] did not consider the evidence of Mrs. *Chrieman* was conclusive that it was her uncle" *Robert Nutt* whom she had seen. No doubt they were quite right. It was evidence that the man she saw in *Melbourne* was her uncle, subject to the remark and observation that she, who had known him well when she was a girl of fifteen, just seeing or getting a glimpse of a man in a crowded street in *Melbourne* was more likely to be mistaken than not. That was a fair argument for the jury.

Supposing the jurymen had found as a fact that they thought she was mistaken, would or would not the grounds have existed upon which the presumption from a seven years' absence would arise that the man not heard of was dead? I think certainly they would. It seems to me that when she said, "I have seen the man in the streets of *Melbourne*," it upset the presumption arising from the relatives, including herself, never having seen or heard of him, and it turned the *onus* the other way. It was possible, however, that it might have been proved that the man she saw was not *Robert Nutt*, but somebody else. If that had been proved, it would have left the matter just as if she had never made that statement. When she said she thought she had seen him, and all the others had heard it from her, although that unexplained and uncontradicted statement affected the *onus*, yet, as soon as it was made out by satisfactory evidence that she was mistaken, the hearing from her was gone, and the presumption would remain as it was before.

Now, my Lords, of course it is essential for the purpose of saying whether the proper direction was given by the Judge or not to see what the proper direction would have been, and then to see if that which would have been the proper direction was given to the jury. I think jurymen who were not lawyers—nay, I think many lawyers themselves—would be under the impression that the commonly enunciated rule about a man's not being heard of for seven years, would mean that there has not been a physical hearing of him, and that if the relatives had been told of something which happened within the seven years, from which they believed that he was alive, that would be a hearing of him, and that would put an end to the presumption, though it might be proved that the information so brought to the relatives was positively untrue. I cannot think that, but they might think it. They might imagine that the rule of law was absolute and positive, that hearing was enough. If that be so, I take it that it is clear that the Lord Chief Baron ought to have given them a direction that in the event of their coming to the conclusion, whether rightly or wrongly, that Mrs. *Chrieman* was mistaken when she said she saw her uncle, and that she did not see him, then there was an absence of ground for believing that he was alive within the seven years, the period sufficient to raise the presumption.

Now, my Lords, the question comes to be, did the Lord Chief Baron give the proper direction to the jury or not? That depends altogether upon what we find in the bill of exceptions. It is certainly an unlucky thing that it is inartificially drawn up, and that we have only a fragment, apparently taken out of the shorthand writer's notes, of the learned Chief Baron's summing-up; but if there were other passages which would have qualified these, the learned Chief Baron and the counsel for the Defendants ought to have taken care that those passages were introduced, and that any necessary corrections were made in the bill of exceptions. We can but deal with the words as we have them.

My Lords, it is of considerable importance to observe that, although it is put in the wrong place in the bill of exceptions, it does appear that the counsel for the Plaintiff did put the right point to the Judge. He said to the Judge, and said it in the hearing of the jury, that the jury ought to be told that if they "were satisfied, from the improbabilities of the case or otherwise, that Mrs. *Chrieman*, junior, was mistaken in believing the person seen by her in *Melbourne* to be *Robert Nutt*, then the said *Robert Nutt* might be presumed to be dead, having been absent for more than seven years without being heard of." Such, I think, undoubtedly was the true proposition of law, and the jury heard the Plaintiff's counsel say that. We are not told in the bill of exceptions what the Defendants' counsel urged to the contrary. Probably they did not assent to that being the law, but said something else, but what it was we do not know.

Now what are the jurymen told? They are told, "not being heard of means this, that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more." I do not think that in the circumstances that is strictly correct, because I think though it might raise a reasonable doubt, which would, of course, shift the presumption, yet the facts might be made clear the other way, and it might be shewn that the reasonable doubt was not well founded as in this supposed case: if a respectable person came and said, your brother, whom you think to be dead, is alive; I saw him, and spoke to him yesterday; every one must feel that that would raise a reasonable doubt, and that, if undisputed, it would put an end to the effect of the seven years' presumption. But supposing the other side should be able to call witnesses to satisfy the jury that the person who thought that he had seen him was quite mistaken, was deceived, the relatives having previously believed that the man who had told them he had seen the brother was telling them the truth, could it be said, after it was proved that the man who told them that, had been cheated into the belief that he had seen the brother, could it be said that that evidence, so explained, put an end to the presumption arising at the end of seven years? I apprehend not; yet the wording of the Lord Chief Baron in the first line might have led the jury to think so; and I must acknowledge that when I read the whole through, I think it did lead the jury to think so—whether so meant or not.

The Lord Chief Baron says: "not being heard of means this: that no member of the family has heard anything about him which might raise a reasonable doubt in their minds whether he must have been no more. You cannot say that a man has never been heard of when in the first place one of his nearest relations actually comes and says she saw him alive and well within three years, still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated." If he had gone on, and said, but if the foundation of that statement is disproved, of course it will go for nothing, it would have been correct. He certainly does not in words say that. We will see what he does say. He says: "You cannot have any one called before you who saw him die or saw him buried. You have therefore no direct evidence except the evidence that he was alive two or three years ago." Of course, if it was believed that he was alive two or three years ago all presumption was at an end. "On the other hand, you have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relations for the space of seven years, when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive in 1872 or 1873." It is not a statement that all that would be evidence until it was displaced by shewing that it was founded upon a mistaken fact—if it had been so said, I should have agreed at once that it was quite right; but it seems to me to be a positive statement that there was evidence that *Nutt* was alive, even if the jury thought the information which the relatives received was founded upon mistake.

Then the Lord Chief Baron goes on to say: "I, for myself, looking to the whole of the case, not only can see no evidence upon which you would be justified in finding that he was dead, but the very ground of the presumption which sometimes arises of death from a man having disappeared, and then never having been heard of for seven years, is entirely removed by the most positive and direct evidence that every relative he had at *Cheltenham*, or, so far as we know, in the world, has heard that he was alive." It would have been right if he had said: But if that statement which they heard is proved to your satisfaction to be untrue, or to be founded on a mistake, it goes for nothing, because it does not rebut the presumption. But he does not say that, if he had, it would have been right. He goes on farther: "Then when you come to ask yourselves the question whether what they heard was what ought to have satisfied them at the least that he might be alive." I have already said that verbal criticism ought not to be applied in a case like this; but, looking at the particular circumstances before them, and the particular contention of the Plaintiff's counsel, as set out in the bill of exceptions, I cannot help thinking that that would be understood by the jury to mean: "If *Robert Nutt* has been heard of, no matter how, or where, and even you are satisfied that the hearing was founded upon a mistake, that mere fact of hearing is enough." That I think would be a misdirection. Then he says: "You have before you a person on whom no one pretends to cast a reflection, whatever may have been the language in which she made the communication she made to the relatives, she now states positively on her oath that she has no doubt on the subject, that she saw him and knew him, and that it was her uncle *Robert Nutt*." Had he gone on to put the case of their thinking that she was mistaken in so doing it would have been all right. I think, he ought, under the circumstances, to have said that, and that his not saying it was an absence of direction where his duty called upon him to give a direction upon the subject. Certainly he does not say that.

Then he goes on to say (I am glad to say, I have only four more lines to read): "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the Defendants." That seems to me to say as strongly as any Judge could say it, there is no evidence upon which you can properly find for the Plaintiff, therefore find for the Defendants. The learned Chief Baron says: There is no evidence; had he said,—Unless you think that the young woman's recognition was mistaken, there is no evidence which would raise the presumption; but if it is proved affirmatively to your minds that she was mistaken, there is evidence which would raise the presumption; had he said that it would have been all right.

My Lords, I agree that we ought not to criticise any one particular word in this direction to the jury, but taking the whole summing-up as applied to such facts, to such evidence, and to such a contention as are stated upon the record, as being the facts and the evidence, and the contention which then took place, are we satisfied that the learned Chief Baron failed to give the proper direction to the jury. I come, my Lords, very reluctantly to the conclusion that he did fail to give the proper direction, and consequently that there should be a *venire de novo.* I regret it, because, as I have said before, as far as one can form an opinion upon the matter without having the whole of the facts fully before one, I think if the proper direction had been given, the verdict would have been the same—I cannot help that. If the proper direction was not given, the Plaintiff has a right to say that the jurors should form their opinion upon the evidence with the proper direction, and consequently there should be a *venire de novo.* The real point which has arisen depends entirely upon the construction of this very inartificial bill of exceptions; but upon that construction, as I read it, I think the judgment of the Court of Appeal was right.

LORD GORDON:—

My Lords, it is with extreme diffidence that I venture to join in the views which have been expressed by my noble and learned friend, Lord *O'Hagan*, because your Lordships have here to construe a judicial act, if I may so express it, which has been more general in use in *England* than in *Scotland*. We have the system of exceptions in *Scotland*, but I must own that I think it has thrown a great deal of discredit upon the system of jury trials which exists in *Scotland*, and I feel some relief in thinking that this may be considered as about the last case which will arise under a bill of exceptions in this country.

In the present case we have the charge of a learned Judge, an experienced common lawyer, addressing a special jury of the county of *Surrey*, men of great intelligence, and when we come to consider the charge which has been given, we find that not only does the opinion of the Lord Chief Baron *Kelly* appear to be supported by his own great authority, but we find that Lord *Coleridge* also I think adopts it, and says substantially that Lord Chief Baron *Kelly* had left the question as to the accuracy of this witness, Mrs. *Crieman*, to the jury, for much of the case turned upon that. The Master of the Rolls takes a different view, but he at the same time says that it is a question attended with very great difficulty, and that you must not scan the words of the Judge too narrowly. He says, "I do not mean to say, and I should be very sorry to say, that it is fair to any Judge to criticise very minutely every word and every line he made use of. It is for that reason I do not confine myself to any sentence, or any line, or any word, but having read the whole attentively several times in the course of the argument, and having the evidence, the conclusion I have arrived at, after some hesitation is, that he did not leave that question fairly to the jury, that he ought to have left that question to the jury, and, therefore, there ought in this case to be a new trial." Now I venture very respectfully to differ from that view, and to concur in the opinion of Lord *Coleridge* that really the question was fairly left to the jury.

My Lords, it would be unpardonable in me to go over all the statements of the Lord Chief Baron and the other learned Judges who commented upon his summing-up, because these have been adverted to by the noble and learned Lords who have preceded me, and who are much more capable than I am of criticising the statements which have been made by the Lord Chief Baron, but I venture to think that if you look at one or two sentences you will find that he says in words—certainly in substance—that it depends upon the accuracy (as to her honesty there was really no doubt) of this niece of *Robert Nutt*, who said that she had seen her uncle in *Australia*. He says: "The truth is, it is idle to dream of such a thing; not only is it so, not only have you the direct evidence of this lady, who may be mistaken, for anybody may be mistaken, as sometimes people are so much alike that even their most intimate friends and members of the family may go to speak to one person taking him for another." He therefore brings out the possibility of mistake in her evidence, and brings it fairly before the jury, and the jurors had said that they did not regard her evidence as conclusive. That shews really that they were an intelligent jury, quite understanding what were the propositions which they had to try, and giving their attention to the evidence upon the point. They had the advantage of hearing the evidence, and also the direction which was sought by the counsel for the Plaintiff who asked for a special direction. The jurors therefore saw from an intelligent point of view, for it all passed in the presence of the jury, what really was the true issue which they had to try. As regards the proposition itself, in point of law, which was thus asked to be laid down, that also might admit of criticism, because a proposition when sought to be positively laid down by the Judge must be very precise and independent of the circumstances of the case, it must be a pure proposition, and I find here that the proposition is thus expressed generally in very accurate terms, but still containing two words which I think might taint the proposition as a whole, "if the jurymen were satisfied from the improbabilities of the case *or otherwise* that Mrs. *Chrieman*, junior, was mistaken in believing the said person seen by her in *Melbourne* to be *Robert Nutt*, then the said *Robert Nutt* might be presumed to be dead, having been absent for more than seven years without being heard of." The words which I object to are "if the jury were satisfied from the improbabilities of the case *or otherwise*." That is too vague. Our judgment does not proceed at all upon this, but the word "otherwise" introduced into the proposition on a point of law might, I respectfully think, have justified the Lord Chief Baron in refusing upon that ground to lay down the proposition so expressed.

My noble and learned friends who have preceded me have stated what is the position in which this case will be left. I cannot say that it is one which involves very large interests; it is a mere question of the payment of the money upon an insurance for £500, and the costs may be more important than the original sum; but if the judgment of the House is given upon the principle *Semper presumitur pro negante,* the result will be that the judgment of the Court below will stand. Therefore, while I say I differ from my noble and learned friends with very great diffidence, still I feel bound to express my opinion, and I think it is just one of those cases which give rise to a difference of a opinion. We find, however, that a difference of opinion did not exist in the Court before which the case came, that is to say, it did not exist between the Lord Chief Baron and the jurymen, for they had no difficulty upon the matter; the difficulty arose in the intermediate Court of Appeal, among the Lords Justices, and, unfortunately, it continues in the present Court.

The question was put that the judgment of the Court below be reversed.

Their Lordships being equally divided, the appeal was ordered to be dismissed, but without costs.

Lords' Journals, 15th June, 1877.

Solicitors for the Appellants: *Barnard & Co.*
Solicitors for the Respondent: *Edward Doyle & Sons.*

[HOUSE OF LORDS.]

LOCKYER	APPELLANT;	H. L. (Sc.)
FERRYMAN *et al.*	RESPONDENTS.	1877 *March* 6.

Marriage—Suit for Declarator dismissed—Suit renewed—Res judicata.

In 1842 a suit for declarator of marriage was brought against a lady, but after trial was dismissed in 1846. In 1875, after the lady's death, a second suit was brought for declarator of the same marriage, and for reduction of the former decree. In 1876 the second suit was held to have been barred by the plea of *res judicata*, and this decision, on appeal, was affirmed by the House of Lords.

Per THE LORD CHANCELLOR (1):—The Appellant has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of the former proceedings.

Per LORD HATHERLEY:—I do not apprehend that we need go further than to say that this gentleman—who had the opportunity of having his case fairly heard thirty years ago—cannot now, after the death of the person principally concerned, be in a position to ask that the principle of *res judicata* shall not be pressed to its fullest and furthest results.

Per LORD SELBORNE:—When there is *res judicata* the original cause of action is gone; and it would be destructive of all certainty in the administration of law, in the status of families, and in the enjoyment of rights, if it were not held incumbent on any one attempting to get rid of a solemn judgment to shew that he comes forward to do so with reasonable promptitude and diligence.

Per LORD BLACKBURN:—The object of the rule of *res judicata* is always put upon two grounds; the one, public policy, that there should be an end of litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before, and *à multo fortiori* there is nothing alleged that would be ground for a new trial after, judgment pronounced thirty years ago.

Per LORD GORDON:—It would be lamentable for the law of *Scotland*, especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the cause was originally tried.

ON the 5th of April, 1842, Mr. *Lockyer* brought an action asking from the Court of Session a declarator to the effect that he and Miss *Janet Sinclair* of *Freswick*, in *Caithness*, had intermarried, and stood towards each other in the relation of husband and wife by contract *per verba de præsenti*, and also by promise *subsequente copulâ*. The summons averred the contract, but was somewhat obscure as to the promise *cum copulâ*, which, however, was subsequently and positively asserted in the condescendence.

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(1) Lord *Cairns*.

Miss *Sinclair* met Mr. *Lockyer's* allegations by an absolute denial of the marriage; and although it appeared that a considerable intimacy had subsisted between the parties, and that written, or verbal, declarations had been interchanged by them, evidencing an ultimate nuptial *intention*, there was no proof of any present agreement to constitute an actual and valid marriage; Miss *Sinclair* declaring to Mr. *Lockyer* her aversion to private irregular marriages, and her resolution to marry only by public and formal celebration. Of the alleged promise *cum copulâ* no proof was tendered. The Court of Session on the 3rd of March, 1846, pronounced judgment in favour of Miss *Sinclair*, assoilzieing her from the whole conclusions of the summons with expenses (1).

Against this decision Mr. *Lockyer*, on the 15th of February, 1849, presented an appeal to the House of Lords, and Miss *Sinclair* put in her answer thereto on the 26th of March, 1849. But neither party moving further in the case, the appeal, on the 11th of February, 1850, under a standing order of the House, stood dismissed, for want of prosecution.

Twenty years afterwards, in June, 1870, Miss *Sinclair* departed this life, having appointed Mr. *Ferryman* and the other Respondents to be her trustees.

On the 9th of August, 1875, the present action was commenced by Mr. *Lockyer* against Miss *Sinclair's* trustees, renewing his application for a declarator of his marriage with her, praying a reduction of the prior interlocutors against him, and also of her trust deeds, with a decerniture to make over to him the whole of her means and estate.

The trustees appeared as Defenders, insisting that the second action was barred *exceptione rei judicatæ*, and also by delay and acquiescence.

The Lord Ordinary (Lord *Craighill*), on the 15th of February, 1875, assoilzied the defenders from the whole conclusion of the summons with expenses; and upon a reclaiming note the Second Division of the Court of Session, on the 28th of June, 1876, adhered to the Lord Ordinary's interlocutor with additional expenses (1), whereupon Mr. *Lockyer* appealed to the House of Lords, having for his counsel Mr. *Campbell Smith* of the Scotch Bar and Mr. *MacAlpine;* who contended that the Appellant was entitled to a declarator of marriage on the ground of matrimonial consent, but chiefly on the ground of promise followed by consummation; urging that the decrees in the former action had been obtained through fraud and by false evidence; adding that new evidence had at last become available, and would establish the Appellant's case on *media concludendi* different from the grounds relied upon in the former litigation. And they further insisted that no lapse of time could establish *res judicata* when obtained by fraud and false evidence. They cited the following authorities: *Shedden* v. *Patrick* (2); *McPherson* v. *Tytler* (3); *Duchess of Kingston's Case* (4); *Gow* v. *Stackpool* (5); and *Bandon* v. *Bocher* (6) (7).

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(1) 8 Dunlop, 582.

The Lord Advocate and Mr. *Southgate*, Q.C., the Respondents' counsel, were not called upon to address the House; their Lordships delivering the following opinions:—

The Lord Chancellor (8):—

My Lords, upwards of thirty years ago proceedings were commenced to pronounce in an action of declarator that a certain marriage had taken place between the present Appellant and a lady now dead. Those proceedings went through various stages, and resulted in a decree (9) against the Appellant, in substance determining that the marriage upon which he founded his case had not taken place.

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(1) 4th Series, vol. iii. p. 882.

(2) 1 Macq. (House of Lords Cases) 535.

(3) 1 Dunlop, 718.

(4) 20 How. St. Tr.

(5) 1 Dow. 18.

(6) 3 Cl. & F. 510.

(7) In the Court below the Appellant cited the doctrine of the Canon Law which affirmed that *sententia lata contra matrimonium nunquam transit in rem judicatam.* The Judges, however, held that in *Scotland* no such doctrine has been admitted since the Reformation; and at the Bar of the House the canonical precept, which would have barred the plea of *res judicata,* was not pressed on the attention of their Lordships.

(8) Lord *Cairns.*

(9) Dated 3rd March, 1846.

The Appellant did not assert a regular, but an irregular marriage. In the summons certain written documents were alleged to have passed between the Appellant and the lady in question, and to have established a contract of marriage; and then the summons averred,

> That the said acknowledgments were interchanged with the solemn and serious intention of constituting marriage, and marriage was thereby fully constituted between the parties; that the parties, when they thus made their mutual declarations of the said marriage, kissed the Bible in testimony of their understanding of the seriousness of the declaration and their mutual resolution to adhere to it; that the marriage was thus duly completed, and the parties afterwards considered themselves as married and conducted themselves towards each other as husband and wife; they did not wish to make the contract public till the consent and approbation of certain parties was obtained; that the parties were much together, and when absent kept up a constant and affectionate correspondence, the whole of which was written in a style and manner that could not have been written by a lady to a gentleman in any other character than that of an affectionate wife to an affectionate husband, or an affectionate husband to an affectionate wife; that the affectionate intercourse subsisted between the said parties till a comparatively recent period; that notwithstanding what is above set forth, the Defender (1), owing to the arts and importunities of her friends, has recently become estranged from the Pursüer, and casting off the fear of God, and forgetting her solemn vows and matrimonial engagements, does now most wrongfully and unjustly refuse to adhere to the Pursuer as her husband.

Now, your Lordships are well aware that irregular marriages in *Scotland* may be established either as marriages *per verba de præsenti*, or as marriages by promise *subsequente copulâ.* The allegations which I have quoted went clearly and distinctly to a marriage *per verba de præsenti;* but the summons also averred a promise of marriage between the parties; and it contained further averments, which in some respects were ambiguous and might be considered as merely confined to a contract *per verba de præsenti* or as going beyond it.

The summons was met in the first instance by a defence on the part of the lady, in which, adverting to those allegations in the summons which I have read, she said:

> It is denied that the marriage was thus duly completed, and that the parties afterwards considered themselves as married, and conducted themselves towards

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(1) Miss *Sinclair.*

each other as husband and wife. What the specific acts may be to which the Pursuer means to refer as supporting these averments, the Defender is at present at a loss to conceive, and she can therefore only meet them with a denial as general as the assertions themselves, which are altogether unfounded.

That is to say, the lady replied to this summons by saying, "You allege that we conducted ourselves towards each other as husband and wife; that is a general allegation which may comprehend in it every kind of conduct which can take place between husband and wife. I desire to know what are the particulars to which you refer; at present I can only deny generally what you allege generally; and in that form I do deny what you allege." Being thus challenged, a revised condescendence was submitted on the part of the Appellant, in which he addressed himself to this particular matter; and having again alleged the promise of marriage, he averred further in the most positive and distinct way that the marriage was duly consummated by sexual intercourse; and he stated particularly the dates and times when this intercourse, as he alleged, took place. To that revised condescendence there was a pleading on the part of the lady, both by way of answer to the different allegations in the revised condescendence, and by way of statement of facts on her own part, in which she, in the most positive and distinct manner, denied every one of the allegations with regard to sexual intercourse.

My Lords, in that state of things, there having been a summons, which, although ambiguous, was in my opinion large enough to have covered and included in it the allegation of cohabitation and consummation of marriage, and the Appellant being challenged to condescend more precisely upon the particulars of his general allegation, the consummation of the marriage having been denied, I think it cannot admit of doubt that if the Appellant had been able to do it, he would have entered upon proof to establish the cohabitation which he thus alleged. My Lords, he did not do so; he adduced no proof whatever upon the subject. Evidence was led, perhaps unnecessarily, on the part of the Defender, but upon the part of the Appellant no evidence whatever was produced: and, feeling the weakness of this part of his case, he by his counsel at the Bar did not insist upon it.

The Court of Session upon the other part of the case, that is to say, upon the allegation of a marriage *per verba de præsenti*, held that that which passed between the parties had not passed with any serious intention of creating the relation of husband and wife. With the correctness of that decision your Lordships are not at present concerned; but that was the decision both of the Lord Ordinary and of the Court of Session. An appeal was presented against it to this House, but was dismissed; it not having been brought on for argument in the proper time.

That being the state of matters upwards of thirty years ago, the present action was raised in 1875 for the purpose of reducing the decrees in the former action. The Appellant now contends in the first place that although there was in the former action an allegation of marriage, still no proof having been adduced upon the allegation of consummation, and it not being, as was alleged at the Bar, distinctly averred in the summons that a marriage was completed by consummation following upon a promise—the plea of *res judicata* is not a valid plea to be set up to prevent the attempt now to assert a marriage by promise *subsequente copulâ*. And then it is said further that matters have now come to the knowledge of the Appellant which ought to entitle him to reduce the former proceedings, and to get rid of the effect of the plea of *res judicata*.

My Lords, it appears to me that in the former proceedings, the summons being such as I have mentioned, and the condescendence following upon that summons being of the kind it was; if the present Appellant had had it in his power to adduce evidence of the consummation of the marriage following upon a promise he would have been well entitled to do so; and if having adduced that evidence the Court had been of opinion that he had proved his case, and had thereupon made a declarator establishing the marriage, that would have been an establishment of the marriage which would have been binding upon both parties, and which could not afterwards have been disturbed by reason of any insufficiency in the pleading. It might well be that if in the course of the proceedings any want of preciseness in the averments had been noticed, steps might have been taken to cure or supplement them; but I cannot think that there was any such insufficiency in the summons, followed as it was by the condescendence in the shape in which we find it, as should entitle the Appellant afterwards to say that he had not the power of raising the whole of the case in regard to this marriage, if he had had evidence to prove it.

My Lords, I doubt very much whether it is at all necessary in the present case to lay down any abstract rule as to the extent to which a sentence in a declarator of marriage is binding as against any subsequent attempt that may be made to establish the marriage upon any new or different footing. I think it is quite sufficient in the present case to say that no man who shews that at the time of his first proceedings he had the whole facts within his knowledge, and who had the power to raise them—who puts upon his record statements which prove that he had the whole of this knowledge in his possession—can be heard, because he does not attempt to prove one part of the case, to say after the lapse of thirty years that he is entitled to commence a new litigation, to raise again a portion of the case which, if it had any foundation, was perfectly well known to him at the time of his first proceedings.

But now I turn to a consideration of what are the new facts which the Appellants says have come to his knowledge since the former action, and upon which he now claims to re-open this litigation. The averments, the relevancy of which is now in question, are extremely vague throughout the whole course of them; but as I understand them they amount simply to statements in which referring to witness after witness who was examined on the former occasion, not by the Appellant himself (for he led no evidence), but on the part of the lady, he asserts now as to all those witnesses that what they stated was contrary to the truth; and then further with regard to the greater portion of them that they committed perjury either with the connivance or at the instance of the lady; that is to say that she was guilty of subornation of perjury; and upon those conjoint allegations of perjury on the part of the witnesses and of subornation on the part of the lady he seeks to have the case re-tried.

Now, my Lords, I must say that I think the observations of Lord *Gifford* in the Court of Session are perfectly well founded (1), that in every case where witnesses are called before a tribunal which is to judge of the facts spoken to by those witnesses, it is

(1) 4th Series, vol. iii., p. 905.

for that tribunal to say whether it believes or disbelieves them; if it believes them it is not for the defeated party afterwards to say, I assert that those witnesses spoke what was not true, and upon my allegation that they spoke what was not true I ask, as a matter of right, that there should be a new trial before another tribunal so that I may take my chance of what that other tribunal may determine on the facts which may be deposed to. My Lords, there would be no end to litigation if that were held to be a sufficient and a relevant ground on which to ask for the reduction of a former decree.

But, my Lords, those witnesses gave their evidence thirty years ago, and spoke to facts as to the truth or falsehood of which the present Appellant was a perfectly competent judge; for they were facts which in one way or other were perfectly within his knowledge. He had the full means of judging as to whether the allegations of the witnesses were true or untrue—he admits that he had that full opportunity of judging. He does not say he thought their statements were true then, and he has discovered them to be untrue now; but his case is that he knew at the time that the witnesses were saying what was untrue, and that that has been his opinion from that day to the present time. But what has he been doing these thirty years if those witnesses spoke what was untrue? Has he taken any means for bringing the criminal law of the country to bear upon them, and to have it decided whether those witnesses were or were not chargeable with that perjury of which he says they were guilty? He has taken no step whatever. Let it be granted that he could not in *Scotland*, as perhaps he could in this country, have moved to bring the criminal law to bear upon them, has he applied to the proper officer, the public prosecutor in *Scotland*, to have these persons subjected to the penalties of the criminal law? He has done nothing of the kind, he has rested for thirty years, and he now makes allegations as to the perjury of these witnesses which he was just as competent to have made immediately the former trial terminated. He throws in the additional allegation of subornation of perjury on the part of Miss *Sinclair*—he says that that lady was either privy to this perjury, or was herself one of the persons moving to have it committed, but he says that after the lapse of thirty years, when this lady is in her grave; and I think your Lordships will not consider that the vague and hardly intelligible allegation which is contained in the condescendence, to the effect that the lady moved towards having perjury committed, can be sufficient to place the case higher than if it stood simply upon the allegation of perjury committed by the witnesses.

My Lords, I therefore submit to your Lordships that the present proceedings instituted by the Appellant are met, and rightly met, by the plea of *res judicata.* He has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of those former proceedings. And there are no facts here alleged as having come to his knowledge which could be held relevant in a proceeding to reduce the former adjudication.

My Lords, I therefore, agreeing entirely with the Lord Ordinary and the Judges of the Second Division of the Court of Session, think that the case of the Appellant has entirely failed, and I move your Lordships that the present appeal be dismissed with costs.

LORD HATHERLEY:—

Notwithstanding the able argument which we have heard, I think it is impossible for your Lordships to have the least doubt that the Court below have come to a correct conclusion. You have now an application made after thirty years' interval, to have the decision of the Court of Session reduced, on the ground that it was obtained in the first place by perjury committed by the witnesses, and in the second place by subornation of perjury on the part of this lady who has now been for some time in her grave.

My Lords, the safety of mankind, and all that is dear to mankind, may be put in jeopardy if after such a long interval it be permitted for any Pursuer to come, without alleging any reasonable ground whatever, and ask to deal with a *res judicata* upon a fair hearing to which he was a party, and at which hearing he might, had he been so minded, have done all that he now says he is able to achieve.

I do not apprehend that we need go further than to say that this gentleman, who had the opportunity of having the case fairly heard, cannot now, after the death of the person principally concerned, be in a position to ask at your Lordships' hands that the principle of *res judicata* should not be pressed to its fullest and furthest results. Therefore, my Lords, I am of opinion that the appeal should be dismissed with costs.

H. L. (Sc.)
1877
LOCKYER
v.
FERRYMAN.

LORD SELBORNE:—

My Lords, I agree with my noble and learned friends who have addressed your Lordships; and I have but a few words to add upon the second branch of the case.

This is not an action to which the law of prescription applies. When there is *res judicata*, the original cause of action is gone, and can only be restored by getting rid of the *res judicata*. There is no law of *Scotland* (nor, I should hope, of any other country) which gives forty years or any other specified period for this purpose; and it would be most unreasonable and destructive of all certainty in the administration of the law, in the status of families, and in the enjoyment of rights of any description, if it were not held incumbent on any one attempting to get rid of a solemn judgment of a competent Court on such grounds as are here alleged, to shew that he comes forward to do so with reasonable promptitude and diligence, instead of deliberately allowing such a time to elapse as must make it unjust to re-open the question, because any satisfactory investigation of it would be now impossible. In every such case the nature of the allegations, the presence or absence of such a specification of particulars as may enable a Court to judge of their value, the time at which, and the circumstances under which they are brought forward, are, and necessarily must be, material upon the question of relevancy. Here, as to the greater part of the allegations, no excuse whatever is offered for the delay in bringing them forward—others are discredited by the Appellant's own statement, that the persons on whose assertions he relies were not willing to speak what they now allege to be truth while those were living who could contradict them; and the rest are too vague and indefinite to be accepted as constituting grounds *primâ facie* sufficient, at this distance of time, to set aside the judgment of 1846.

LORD BLACKBURN:—

My Lords, I entirely agree in the opinions expressed by the noble and learned Lords who have preceded me. When a competent tribunal, having had a case before them, have given a final judgment, it is *res judicata*. I do not mean to express any opinion as to what would be a sufficient ground to re-open the case. It is enough for the purposes of the present case, and I may safely say thus much, that it must at least be as strong as that on which a new trial would be granted. After the verdict of a jury or the finding of a Judge there may be an application for a new trial on the ground that the verdict was against the weight of evidence, or that the parties were taken by surprise, or that there was false evidence given; but I apprehend that it never is enough simply that the party against whom judgment has been given should say he is dissatisfied with the verdict, and that the witnesses have stated that which is false. I do not think that would be held to be sufficient even in moving for a new trial at the proper time to do it. It is necessary that enough should be shewn to make the tribunal which is to consider whether there should be a new trial think that the trial was unsatisfactory. In the present case I think that if every averment now upon the record had been made by the Pursuer on an application for a new trial at the time of the reclaiming note in 1845, the proper judgment of the Court on the application then brought before them would be: "This is not a case in which we need call upon the other side for an answer."

It is most pointedly and indignantly denied that there was any sexual intercourse at all. I find the lady persisting in her denial —that is all the surprise he gets. He did not bring forward any evidence, and he could not have asked for a new trial. Every other averment is of the vaguest and loosest description. He says the witnesses were kept back by terror. Those are not matters which, if they had happened, would be for a moment listened to.

That being so, if nothing is put forward which would be a ground for a new trial, or even for granting what in *England* is called a rule nisi to shew cause why there should not be a new trial—I suppose in *Scotland* there is something similar to it—nothing that would require the Court to call on the other side for an answer, can it be said that now, after a lapse of thirty years, a party in the position of this Appellant is entitled to demand further proof?

I think Mr. *Smith* put it very well at your Lordships' Bar in this way, "I do not say that what I put forward proves that I am entitled to set aside the judgment; but what I say is enough to

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give me the right to go to proof and to go to trial." That was the argument used, but I cannot agree that after *res judicata*, after judgment has been obtained, it is enough to aver that the thing was wrong. The object of the rule of *res judicata* is always put upon two grounds—the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before judgment was pronounced; and *à multo fortiori* there is nothing alleged that would be ground for a new trial after judgment pronounced thirty years ago.

LORD GORDON:—

My Lords, I agree that the principle of *res judicata* applies to the present proceedings; and I also think that the noble and learned Lord who last addressed the House has shewn the impropriety of acceding to any such application as is made for a new trial in this case, which was decided thirty years ago.

It would be lamentable for the law of *Scotland*, and especially with reference to the marriage law, if it were competent for parties to come forward again after the lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the case was originally tried.

I can only say that I am sure your Lordships have derived all the assistance which counsel could possibly give you from the Appellant's counsel, Mr. *Smith*, who has brought the case fairly and fully before your Lordships; and I think every justice has been done, and that the full consideration which this case has received from your Lordships as well as from the Court below ought to satisfy him that he has no case.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Agent for the Appellants: *R. M. Gloag.*
Agent for the Respondents: *Andrew Beveridge.*

[HOUSE OF LORDS.]

McKINNON . . . . APPELLANT;

ARMSTRONG BROTHERS & CO. . . . RESPONDENTS.

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March 22.

Compensation and Retention in Bankruptcy—Mutual Credit.

Per LORD BLACKBURN:—The law of *Scotland* on the subject of compensation and retention in bankruptcy is, in effect, very nearly, if not precisely, the same as the law of *England* with respect to mutual credit.

Set-off—Collateral Security no Bar.

Per LORD BLACKBURN:—I think the law is tersely and accurately expressed by Lord *Ormidale* in the Court below. He says: "I can neither find authority, nor see any good reason for holding, that the circumstance of a party having a collateral security for his debt is destructive of his right of compensation or set-off,—supposing it to be otherwise well founded."

Set-off—By Holder of Bill after Bankruptcy

Per LORD BLACKBURN:—It has for many years been decided, both in *England* and in *Scotland*, that if the indorser of a bill became a party to the bill before the bankruptcy, he may set it off on becoming holder afterwards.

THE Appellant, as trustee on the sequestrated bankrupt estate of *Hannay & Sons*, iron masters in *Glasgow*, brought the present action against the Respondents, iron brokers in *Glasgow*, for payment of £9000, the purchase-money of iron sold and delivered by the bankrupts to the Respondents in 1874.

The defence was that the amount sued for was more than satisfied by a counter-claim of £13,000 due from the bankrupts under seven bills, of which the Respondents were the onerous indorsees and holders.

On the other hand, the Appellant asserted that the Respondents were not the holders of the bills at the date of the sequestration; and that they moreover had a security from a third party to relieve them from the debt.

The Court of Session (Second Division) decided in favour of the Respondents with expenses (1), and hence the appeal to the House.

(1) 4th Series of Scotch Cases, vol. i. p. 399.

Mr. *Joseph Brown*, Q.C., and Mr. *Balfour* (of the Scotch Bar), were heard for the Appellant.

Mr. *Cotton*, Q.C., and Mr. *E. Kay*, Q.C., for the Respondents, were not called upon; the House adjourning, with a request that Lord *Blackburn* would specially examine the intricate details presented by the pleadings. His Lordship ultimately delivered the following address (1), stating fully all the material facts, and commenting on the authorities cited and bearing on the question.

LORD BLACKBURN :—

My Lords, In this case the Appellant, as trustee for the sequestrated estate of *Hannay & Sons*, sued the Respondents in the Court of Session for a debt due by them before the sequestration to *Hannay & Sons*. It is not disputed that the Appellant proved a debt exceeding £11,000, and it is not disputed that the Respondents proved a cross claim exceeding £2000. The controversy is as to the difference, which exceeded £9000.

As to this the Respondents set up two defences. One was as to a part of the claim only, viz., £7461 10*s.* 1*d.* It is not necessary to notice this partial defence, further than to say that there was such a defence, and that the Appellant denied it.

The other defence, on which the questions discussed at the Bar and on which the House has now to decide arise, went to the whole cause of action. It was to the following effect: *Hannay & Sons* had, whilst still carrying on business, accepted seven bills of exchange drawn on them by *Armstrong, Müller, & Co.*, payable to the drawer's order. These seven bills were all drawn and accepted for iron sold and delivered to *Hannay & Sons* in the course of the year 1873, whilst *Armstrong, Müller, & Co.* were still carrying on business. *Armstrong, Müller, & Co.* dissolved partnership on the last day of December, 1873, after which date the firm only existed for the purpose of liquidation. *Armstrong, Müller, & Co.* in liquidation indorsed those bills, and *Armstrong Brothers*, the Respondents, also indorsed them and delivered them to the *Clydesdale Bank*, who discounted them for *Armstrong Brothers*. On the

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(1) Printed and afterwards revised by his Lordship.

28th of March, 1874, before any of the bills arrived at maturity, *Hannay & Sons*, the acceptors, were sequestrated, the bills at that date being in the hands of the *Clydesdale Bank*.

The Respondents' contention was, that under the Scotch law of compensation and retention in bankruptcy they were entitled to set off these acceptances, or so much of them as might be necessary, against their own debt to the sequestrated estate of *Hannay & Sons*. And as the amount of these acceptances considerably exceeded the amount of the Respondent's debt, this, if made out, was a complete answer to the claim of the Appellant. The Appellant contended that the position of the Respondents was not such as to entitle them to this set-off.

The Lord Ordinary, before whom the case was tried, was of opinion that, on the evidence, neither defence was made out, and by his interlocutor of the 29th of October, 1874, he gave judgment for the Appellant for the amount claimed. The Second Division of the Court of Session, by their interlocutor of the 2nd of February, 1875, recal that interlocutor, and assoilzie the Defenders from the conclusion of the action. It is against this last interlocutor that the appeal is brought to this House.

It appears from the opinions delivered by the Judges of the Court of Session that they were of opinion that the defence depending on compensation and retention was made out; but that the partial defence going only to £7461 10*s.* 1*d.* was not made out.

My Lords, if the defence going to the whole is made out, the interlocutor appealed against is right, whether the partial defence was made out or not. Your Lordships have not heard any argument as to the soundness of the decision on the partial defence, nor has it been at all considered by your Lordships. I only mention it for the purpose of saying that that decision is in no way affected, either for the better or the worse, by the judgment to which the House may come to on the other defence, which goes to the whole.

Your Lordships heard an exhaustive argument from the Appellant's counsel, at the end of it intimating that you did not then think it necessary to hear the counsel for the Respondents.

My Lords, the law of *Scotland* on the subject of compensation and retention in bankruptcy, and the history of it, is clearly explained in *Bell's* Commentaries (1). It is in effect very nearly, if not precisely, the same as the law of *England* as to mutual credit, though there is no statutable enactment in the Acts relating to bankruptcy and sequestration in *Scotland* similar to those relating to mutual credit, which since the 4 Anne, c. 17, s. 11, have been inserted in the English Bankrupt Acts. If there be any differences between the law of the two countries, there are at least none on such a state of facts as exist in the present case. I think your Lordships refrained from giving judgment at once more from a desire to make sure that the facts as appearing on the evidence were accurately apprehended, than from any doubt as to what the law was as to those facts if rightly understood.

I will now proceed to state what I understand to be the material facts as proved. They are a little complicated from there being five firms engaged in the transactions, viz.:—*T. Vaughan* till the end of 1872, and from that date *T. Vaughan & Co.*, who carried on the business of *T. Vaughan*. These two firms may, however, be treated as if they were one. *Armstrong, Müller, & Co.*, who dissolved partnership on the 31st of December, 1873, when *Müller* retired, and from that date existed only for the purpose of liquidation. *Hannay & Sons*, who were sequestrated on the 28th of March, 1874. *Armstrong Brothers*, the Respondents, a firm which was formed on the 1st of January, 1874, and succeeded the dissolved firm of *Armstrong, Müller, & Co.* This new firm (the Respondents) consists of *W. T. Armstrong*, who is a partner in the late firm of *Armstrong, Müller, & Co.*, and *T. N. Armstrong*, who was not in any way a member of that firm.

It is necessary for the right apprehension of the facts to bear in mind the different interests of the four firms. 1st. *T. Vaughan* and *T. Vaughan & Co.*, treating them as one. 2nd. *Armstrong, Müller, & Co.*, both before and since the dissolution. 3rd. *Hannay & Sons*. 4th. *Armstrong Brothers*.

The first transaction to be noticed is a contract bearing date the 26th of June, 1872, by which *Armstrong, Müller, & Co.* agreed to sell to Messrs. *Hannay & Sons* 6,000 tons No. 4, *Middleborough* forge iron at 92*s*. per ton, delivered into Messrs. *Hannay & Sons*' works delivery to be made at about the rate of 1000 tons per month, commencing July, 1873, and ending December, 1873. Payment nett cash on last cash day of the month for the quantity delivered during the previous month, or by acceptance payable at four months, adding cost of stamp and discount. It was at first supposed by the Appellant that this contract was really made on behalf of *Thomas Vaughan;* but the evidence proves beyond all doubt that this was the contract of *Armstrong, Müller, & Co.* as principals, and not of *T. Vaughan* at all; and the Appellant has not, either before the Court of Session or at your Lordships' Bar, disputed this.

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(1) 7th Ed. vol. ii. p. 118, book 5, ch. 4, sect. 2.

The seven bills in question were all drawn and accepted in payment for iron supplied to *Hannay & Sons* in pursuance of this contract. It is only material to point out that for the iron delivered in December, 1873, payment would not fall due till January, 1874, which was after *Armstrong, Müller, & Co.* had dissolved partnership, and after the Respondents' firm of *Armstrong Brothers* had been formed and had begun to carry on business. *Armstrong, Müller, & Co.*, with a view no doubt to secure iron with which they would be able to fulfil their contract to *Hannay & Sons,* entered into negotiations with *Thomas Vaughan,* which resulted in a contract, in fact concluded some weeks after the 26th of June, 1872, but dated on that day as being the day on which the negotiation commenced. By this contract *Thomas Vaughan* bound himself to supply to *Armstrong, Müller, & Co.* the same quantity of iron at the same dates and of the same quality as that which *Armstrong, Müller, & Co.* had bound themselves to supply to *Hannay & Sons.* But the place of delivery was different, being free on board *Tees,* and the price was different, as of course it should be, as *Armstrong, Müller, & Co.* would be at the risk and expense of the sea carriage from the *Tees* to *Glasgow,* and meant to make some profit. The payment was to be "Nett cash on last cash day of the month for quantity delivered during previous month, or by Messrs. *Hannay & Sons*' acceptance at four months' date."

There can be no doubt that *Armstrong, Müller, & Co.* entered into this contract with the intention of applying the iron they were to receive from *T. Vaughan* to the fulfilment of their contract with *Hannay & Sons.* But the two contracts were perfectly independent. *Armstrong, Müller, & Co.* must have fulfilled their contract to *Hannay & Sons* though *T. Vaughan* had made default in delivering iron to them, or though the iron shipped in the *Tees* had been lost at sea; and they were bound to take and pay for the iron supplied by *T. Vaughan* even if *Hannay & Sons*' failure had happened a year sooner than it really did, and before any iron was deliverable from *Armstrong, Müller, & Co.* to *Hannay & Sons.*

When on the last cash day in August, 1873, the first payment fell due from *Armstrong, Müller, & Co.* to *T. Vaughan* for iron shipped in the month of July, 1873, a question arose between them and *T. Vaughan & Co.* (who had succeeded *T. Vaughan*). *Armstrong, Müller, & Co.* (on what ground does not appear), required *T. Vaughan & Co.* to draw upon *Hannay & Sons* for the amount. *Vaughan & Co.* maintained, with apparent reason, that though they were to take payment in *Hannay & Sons*' acceptances, that meant *Hannay & Sons*' acceptances of *Armstrong, Müller, & Co.'s* draft. The contract, it may be observed, does not expressly say who were to draw on *Hannay & Sons.* The dispute went so far, that on the 30th of September *Vaughan & Co.* made a peremptory demand of payment next day, or else they would place the matter in the hands of their solicitors. On cooler reflection, however, the two firms resolved not to quarrel; and on the 23rd of October, 1873, a compromise was made, which was embodied in a letter of that date. It looks as if *Vaughan & Co.* had said to *Armstrong, Müller, & Co.*, We do not wish at present to have our name on *Hannay's* paper; you ought to draw the bills; and after all, what risk do you run, for *Hannay & Sons* are sure to meet them, and *Armstrong, Müller, & Co.* had answered, If you think the risk is so small why do not you take it on yourself. If you do we will draw on *Hannay* as you require. As the event has turned out, it was a mistake to think that there was no risk of *Hannay & Sons* not fulfilling their engagements. But as *Vaughan & Co.* on the 28th of August, 1873, agreed to supply to *Hannay & Sons* no less than 12,000 tons of iron, they must then have thought that risk slight. At all events, the letter of October the 23rd is aptly worded to carry out a compromise on those terms above supposed. From that time all went on peaceably.

The alternative of *Armstrong, Müller, & Co.* discounting the drafts seems to have been adopted, and *Armstrong, Müller, & Co.* retained their drafts on *Hannay & Sons* in their own possession, letting *T. Vaughan & Co.* have cash from time to time in anticipation. The drafts on *Hannay & Sons* by *Armstrong, Müller, & Co.* were for the iron delivered at the rate of 92*s.* per ton. The draft to which *Vaughan & Co.* were entitled would have been only at the rate of 85*s.*, but the parties acted as if a separate draft had been drawn and discounted by *Armstrong, Müller, & Co.*

On the 31st of December, 1873, the firm of *Armstrong, Müller, & Co.* dissolved partnership on terms which were contained in a minute signed by the two partners. *W. J. Armstrong* bound himself by the second clause to liquidate the business of the dissolved concern with all convenient speed; and from and after the date of the dissolution to take over and carry out for his own exclusive behoof and at his own risk the whole existing and unexpired contracts of the said company. The contracts of the 26th of June, 1872, had been completed as far as the delivery of the iron was concerned before the 31st of December, 1873. Five of the bills now forming the subject of dispute had been drawn on and accepted by *Hannay & Sons*, two on the date of 28th of November, 1873, and three on the date of the 30th of December, 1873; and those five bills were in the hands of the firm of *Armstrong, Müller, & Co.* at the date of the dissolution. The payments to *Armstrong, Müller, & Co.* for iron delivered by *Armstrong, Müller, & Co.* to *Hannay & Sons* in the month of December, 1873, and the payments by *Armstrong, Müller, & Co.*, for the iron delivered to *Armstrong, Müller, & Co.* by *Vaughan & Co.* in that month, under the two respective contracts of the 26th of June, 1872, did not fall due till the 30th of January, 1874. What other assets or liabilities of the dissolved firm existed at the time of the dissolution was not made a subject of inquiry at the trial. Probably there were others, but at least there were those. From the fourth article of the minute of dissolution it appears that a list of the bills was made out and signed, but it is not produced and neither party has thought it worth while to inquire for it.

That being the state of things on the 31st of December, 1873, the new firm of *Armstrong Brothers* commenced business on the 1st of January, 1874. This new firm consisted of Mr. *William*

John Armstrong (who was a partner in the firm of the dissolved firm of *Armstrong, Müller, & Co.* and as such was liable on all the contracts of that firm, and who had by the minute of dissolution agreed to liquidate the concerns of the dissolved firm) and also of Mr. *T. N. Armstrong*, who was not a party to the minute of dissolution, and was not liable on any of the contracts of the dissolved firm.

My Lords, much of the argument at your Lordships' Bar proceeded on ignoring the interest of *T. N. Armstrong* in the firm of *Armstrong Brothers*, and arguing as to the position of *Armstrong Brothers* in relation to the transactions subsequent to the 1st of January, 1874, as if that firm had consisted exclusively of *William John Armstrong*.

Mr. *W. J. Armstrong* in carrying out the liquidation of *Armstrong, Müller, & Co.* employed his firm of *Armstrong Brothers* as agents to perform the necessary business, just as he might have employed a firm in which he had no personal interest. He indorsed in the name of *Armstrong, Müller, & Co.* in liquidation the bills accepted by *Hannay & Sons* before the dissolution, and the bills drawn on the 30th of January after the dissolution and then accepted by *Hannay & Sons*, and delivered them to *Armstrong Brothers* who indorsed them in their own names and obtained a large sum on discount of those bills from the *Clydesdale Bank*. *Armstrong Brothers* no doubt would have to account for the sum they thus received. It appears that they made large payments on behalf of *Armstrong, Müller, & Co.*, in liquidation, and the sums which they thus paid, and the sums which they received from or on account of *Armstrong Müller, & Co.* in liquidation, including this sum received by the discount, would all form items in an account between *Armstrong Brothers* on the one side and *Armstrong, Müller, & Co.* in liquidation (or perhaps Mr. *W. Armstrong*, the liquidating partner) on the other. It seems to me not material which would be the party with whom the account was to be struck. This account has never, as far as appears, been adjusted, and neither party has thought fit to inquire what the state of the account was on the 28th of March, 1874, when *Hannay & Sons* were sequestrated. It is by no means clear that the balance was then against *Armstrong Brothers*, even if the discounted bills had been duly honoured. On the 1st of April, 1874, the day after the two acceptances to bills drawn on the 28th of November, 1873, became due, *Armstrong Brothers* paid the amount to the *Clydesdale Bank* by a cheque of their own. Those bills have been retained in the possession of *Armstrong Brothers* ever since.

My Lords, it may be convenient to pause here and inquire whether on this 1st of April, 1874, the Respondents were in a position to support a set-off in bankruptcy as far as regards the two bills then redeemed from the *Clydesdale Bank.* It was argued at your Lordships' Bar that they had altered their position afterwards; with that I will deal subsequently.

Now, if I have correctly stated the facts, *Armstrong Brothers* were indorsers of those two bills, who, on the sequestration of the acceptor, were compelled to take them up. They had a right of recourse against *Armstrong, Müller, & Co.* who were indorsers prior to themselves. They had an unadjusted account with those indorsers, on which the balance might or might not turn out to be in favour of the indorsers. And those indorsers held a letter of indemnity from *Vaughan & Co.*, to which *Armstrong Brothers* were not parties, but under which *Armstrong, Müller, & Co.* might recover from *Vaughan & Co.* at least part of any loss which *Armstrong, Müller, & Co.* might ultimately sustain from the discount of the bills.

I fail to see on this state of facts anything that could prevent *Armstrong Brothers,* then, from setting off the bills of which they were now holders against their debt to the estate of the acceptors. In the Court of Session an attempt seems to have been made to argue that an indorser of a bill, not in his hands and not due at the time of the sequestration, and who therefore at the time of the sequestration was not a creditor of the bankrupt, could not on taking up the bill, and becoming a creditor subsequently to the sequestration, avail himself of that set-off, but at your Lordships' Bar that attempt was properly abandoned. It has for many years been decided, both in *England* and in *Scotland,* that if the indorser became a party to the bill before the bankruptcy in the one country or the sequestration in the other, he may set it off on becoming holder afterwards. See as to the English law, *Collins* v.

Jones (1); as to the Scotch law, 2 Bell Com., p. 123, Book V., chap. 4, sub-sect. 1, paragraphs 6, 2.

If, indeed, the holder receives payment from a prior indorser to him, and hands over the bill to him, he ceases to be a creditor, and can, of course, no longer set off what is no longer a debt to him. For this, if an authority were wanted, *Belcher* v. *Lloyd* (2), which was cited at your Lordships' Bar, is an authority. And the same effect would follow if it was made out that, though the bill was retained in the hands of the indorsee, it had really been paid by a prior indorser. The fact that the indorsee retained possession of the bill being *primâ facie* evidence that it was his property, and so casting the burthen of proof on those who maintain the contrary, but not being conclusive.

But there is no pretence for saying that in the present case there was any evidence that on the 1st of April, 1874, *Armstrong, Müller, & Co.* or their liquidating partner on their behalf, had taken up the bill in the hands of *Armstrong Brothers*. And though there was an unsettled account between *Armstrong Brothers* and *Armstrong, Müller, & Co.* in liquidation, which, if the balance was in favour of *Armstrong, Müller, & Co.* would have afforded facilities for enforcing by compensation and retention the claim of *Armstrong Brothers* against their prior indorser, that would not amount to payment; and there is neither authority nor principle for saying that the estate of the bankrupt acceptor has a right to require the holder of the bill to have recourse to any prior indorser before availing himself of his right to protect himself by compensation and retention in *Scotland*, or under the mutual credit clauses in *England*. All these remarks apply (*mutatis mutandis*) to the bills which became due respectively on the 3rd of May and the 3rd of June.

But *Vaughan & Co.* did on the 3rd of April and the 3rd of June pass to *Armstrong Brothers* two cheques of £4207. 10*s.* each, on account of *Hannay & Sons'* unpaid acceptances for the iron delivered in October and December, 1873. And it was contended at your Lordships' Bar that this had the effect, *pro tanto*, of satisfying the claim of *Armstrong Brothers* on the two sets of bills, which from that time became in part the property either of *Vaughan & Co.*, or of *Armstrong, Müller, & Co.* The counsel did not care which, and if they could have made out either it would have raised their point. And they further said that though *Armstrong Brothers* never parted with the possession of the bills, yet that it was enough to defeat their right to a set-off if they had parted with the property in them.

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(1) 10 B. & C. 777.

(2) 10 Bing. 310.

My Lords, it would be enough to say that the burthen of shewing that such a change in the property in the bills had taken place lay on the Appellant, and that he has failed to satisfy that onus, but I think that when the evidence is examined on this point, it is made out affirmatively that no such change in the property did take place. It is to be remembered that *T. Vaughan & Co.* were not and never had been parties to the bills; and *Armstrong Brothers* had not and never had any right of recourse against *T. Vaughan & Co.* *Armstrong, Müller, & Co.* were parties to the bills, and *Armstrong Brothers* had a right of recourse against them; and *Armstrong, Müller, & Co.* held the letter of the 23rd of October, 1873, under which they might call on *T. Vaughan & Co.* to indemnify them from at least a part of any loss sustained by them in respect of the drafts discounted by them. *T. Vaughan & Co.* were under no obligation to prevent the bills coming back upon *Armstrong, Müller, & Co.;* but they had a strong interest to prevent the bills coming back, if by so doing they could prevent *Armstrong, Müller, & Co.* from sustaining loss, and they had a right to require *Armstrong, Müller, & Co.* to do all that lay in their power to prevent any loss to them from occuring.

Mr. *W. T. Armstrong* was called as a witness for the Pursuers, and Mr. *George Neeshan*, the managing partner of *T. Vaughan & Co.*, was called as a witness for the Defenders, and both swore that the two sums were advanced by *T. Vaughan & Co.* because *Armstrong Brothers* required some assistance to enable them to retain the bills and set them off against the claim of *Hannay & Sons'* trustee, and so prevent any loss. And it is quite clear that the second payment, on the 3rd of June, 1874, must have been made with that view; for the present litigation had then commenced, and the Respondents were defending the action with a view of preventing any loss, which would in part fall ultimately on *Vaughan & Co.*, and neither party could have been so absurd as to intend to defeat the very object of the litigation.

The letters of the 2nd, 3rd, and 4th of April, 1874, shew that at first Mr. *W. T. Armstrong* did not take the correct view of the effect of the letter of the 23rd of October, 1873, and that *Armstrong Brothers* (or perhaps rather their clerk who wrote the letter of the 4th of April, 1874) thought that the two bills were to be delivered over by Mr. *W. T. Armstrong* to *T. Vaughan & Co.*, when he met them on the Tuesday at *Middlesborough*. Had this been done there would have been ground for contending that *T. Vaughan & Co.* had then become purchasers of the bills, and that *Armstrong Brothers* had ceased to have any interest in them. But this was not done, there is no evidence on the face of the documents that *T. Vaughan & Co.* ever intended this, far less had bound themselves to this. As soon as the parties understood their real position they would wish not to do this, and I see no reason at all to doubt the veracity of the two persons who managed the transaction, and who both swear it was not done.

It is quite true that the action is defended in the interest of *T. Vaughan & Co.*, in so far that if *Armstrong Brothers* were obliged to prove these bills on the estate of *Hannay & Sons*, they would come upon *Armstrong, Müller, & Co.* for as many shillings in the pound as the difference between 20*s.* and the dividend might amount to; and then *T. Vaughan & Co.* might be called upon to make good to *Armstrong, Müller, & Co.* a part of this loss. And the Lord Ordinary seems to think that this prevented *Armstrong Brothers* from being interested in the bills (1).

My Lords, the whole of the Judges in the Court of Session were of a different opinion, and I think the reason is tersely and accurately expressed by Lord *Ormidale*, who says, "I am not aware, and can neither find authority, nor see any good reason in equity or otherwise, for holding that the circumstance of a party having a cautioner or collateral security for his debt is destructive of his right of compensation or set-off, supposing it to be otherwise well founded" (2).

(1) 4th Series, vol. ii. p. 404.

(2) 4th Series, vol. ii. p. 414.

My Lords, if your Lordships take the same view of the facts as that which I have above expressed, I think you will come to the same conclusion, namely, that the interlocutor of the Court of Session should be affirmed, and this appeal dismissed with costs.

My Lords, I move accordingly that such should be the judgment of this House.

The Lord Chancellor, who has been obliged to leave the House on public business, and Lord *Selborne,* who heard the argument, but is unavoidably absent, authorize me to say that they agree in this reasoning and the conclusion.

Lord Gordon:—

My Lords, I have merely to say that I entirely agree in the propriety of your Lordships adopting the judgment which has been proposed by my noble and learned friend. The case is one which did not give rise to the slightest difficulty on the part of any of the noble and learned Lords who heard it argued, in reference to the application of the law. It was simply for the purpose of having the facts stated more clearly and fully to the satisfaction of the House than could be done in an opinion orally delivered, that my noble and learned friend was requested to frame the exposition which he has just read to your Lordships.

Interlocutor complained of affirmed, and appeal dismissed with costs.

Agents for the Appellant: *Murray, Hutchins, & Co.*
Agents for the Respondents: *Grahames & Wardlaw.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1877
March 23.

4 App Cas 530

ABERDEEN TOWN COUNCIL . . . . APPELLANTS;
ABERDEEN UNIVERSITY *et al.* . . . . RESPONDENTS.

Obligation of Trustees to Cestui que Trust.

Per THE LORD CHANCELLOR (1):—Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to those who are beneficially interested.

Misuse of a Fiduciary Position.

Per LORD O'HAGAN:—The law of *Scotland*, equally with the law of *England*, condemns the misuse of a fiduciary position, and declares that any advantage wrongfully gained by a trustee shall enure to the benefit of the *cestui que trust.*

Trustees' Unjust Claim not fortified by Lapse of Time.

Per LORD O'HAGAN:—Where a trust has been broken by the trustees for their own benefit, and to the injury of the *cestui que trust*, no lapse of time can validate the transaction.

Salmon-fishings—Trust.

Where the trustees of land affecting actual ownership acquire from the Crown a right of salmon fishing in the adjacent sea, the acquisition enures to the benefit of the *cestui que trust.*

Remit as to Retrospective Accounting.

Cause remitted back to the Court of Session to consider the question of retrospective accounting, as to which the House expressed no opinion.

BY four separate deeds of mortification (2), dated respectively in 1613, 1616, 1622, and 1627, the sum of 12,000 marks Scots was assigned to the Magistrates and Town Council of *Aberdeen* upon trust for the benefit of certain professorships in the College of *Aberdeen*, now become, by the 21 & 22 Vict. c. 83, the *Aberdeen University*. In 1704 the magistrates invested the 12,000 marks in the purchase of land, which was conveyed to their "Master of Mortifications," a municipal functionary, and his successors in office, for behoof of the beneficiaries under the several deeds of mortification or trust aforesaid. Thereafter the magistrates held and managed the property purchased, and applied the proceeds thereof to the benefit of the professors, till 1797, when the then Master of Mortifications, instructed by the magistrates, sold the land for a yearly feu duty of £50, the purchaser being in fact an agent of the magistrates, who surrendered to them the property so purchased, and they were in due time infeft in it under a charter from their own Master of Mortifications, the whole transaction being represented as a municipal "scheme" by which the Town Council enhanced largely its property and income, but restricted the professors to the yearly feu duty of £50.

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(1) Lord *Cairns*.

(2) Mortmain, or trust.

In 1801 the magistrates applied to the Lords of the Treasury for a grant of the salmon-fishings in the sea opposite the lands which they had purchased. A Crown charter of the solicited fishings was accordingly granted to them; and on the strength of it the magistrates now receive from the fishings a yearly rental of £605, while they also receive from the land itself £170 yearly. These two sums, making together £775, have been by the magistrates applied exclusively to municipal purposes, the professors for whose benefit the whole was originally intended receiving only the annual feu duty of £50.

On the 2nd of December, 1873, the University of *Aberdeen*, with its professors and others interested, brought the present action against the Magistrates and Council of the Royal Burgh and City of *Aberdeen*, asking a declaration to the effect that the fictitious sale of 1797 was a nullity, and also praying a reduction of the grant from the Treasury, with a retrospective account of the rents and profits of the land sold, and of the fishings, from the term of Martinmass, 1833, being the prescriptive period of forty years anterior to the date of the summons.

The magistrates put in their defence, denying that the feu duty was inadequate, but, on the contrary, was more than sufficient for a long time after the sale, and stating that the University authorities were fully conusant of the transaction.

The case came in due course before the Lord Ordinary (1), who, on the 25th of November, 1874, pronounced an interlocutor finding that the lands in question were possessed by the magistrates subject to the trusts of the mortifications, and that the beneficiaries were entitled to the whole income subsequent to the

(1) Lord *Young*.

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date of the summons, but that they were not entitled to a retrospective account of rents and profits; and with respect to the fishings, finding that the University of *Aberdeen* had "no right or title thereto."

The *Aberdeen University* presented a reclaiming note to the First Division of the Court of Session, by whom, on the 18th of July, 1876, the following judgment was pronounced:—

Find that the lands purchased in 1704 by the Corporation of *Aberdeen* with funds belonging to the mortifications were sold by the Corporation, as trustee for the mortifications, to the said Corporation, for its own behoof, in consideration of a feu duty of £50: Find that the said sale was illegal and void, and that the Corporation, in entering into the illegal transaction aforesaid, acquired, or attempted to acquire, the said lands for the purpose of being thereby enabled to apply to the Commissioners of His Majesty's Treasury for a grant in favour of the Corporation of the salmon-fishings in the sea *ex adverso* of the said lands: Find that, in pursuance of such purpose, the Corporation in the year 1801 presented a petition to the Lords of the Treasury, setting forth that they were absolute proprietors of the said lands in their own right, and on that ground praying for a grant of salmon-fishings in the sea *ex adverso* of the said lands, for the benefit of the Corporation: Find that the prayer of the said petition was granted, and a Crown charter in favour of the Corporation, conveying the said salmon-fishings, was expede: Find that the Corporation have ever since possessed, and do now possess, the said salmon-fishings, in virtue of the said charter: Find that the Corporation being the trustee for said mortifications, having thus used the trust estate for the purpose of obtaining a benefit to themselves, are bound to communicate that benefit to the trust estate and the parties interested therein, and are bound to hold and administer the said salmon-fishings as part of the said trust estate, and to apply the revenues and profits thereof to the benefit of the parties interested, as beneficiaries in the said mortifications: Find that the concurring Pursuer, Dr. *W. R. Pirie*, is entitled to a share of the revenues and profits of the trust estate, corresponding to his tenure of the professorship of Divinity and Church History from December, 1843, the date of his appointment, till the date of citation: Find also, under the petitory conclusions, that the late *John Cruickshank*, as concurring Pursuer, was, and his representatives who have been sisted in his place, are entitled to a share of the profits and revenues of the trust estate, corresponding to his tenure of the professorships of mathematics, from or about the year 1833 till the year 1858: Find that the said shares of the profits and revenues of the trust estate for the said periods may competently be ascertained and decerned for in the present action: Find the Pursuers entitled to the expenses hitherto incurred by them, and remit to the Auditor to tax the account: Remit to the Lord Ordinary to proceed with the accounting in accordance with the above findings, and to proceed further as shall be just, with power to decern for the expenses now found due (1).

Recal the Lord Ordinary's interlocutor.

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(1) Fourth Series, vol. iii. p. 1087.

Against this judgment the *Aberdeen* magistrates appealed to the House, having for their counsel *The Lord Advocate* and Mr. *Cotton*, Q.C. (with them Mr. *Keir*, of the Scotch Bar). Relying on the doctrine of prescription, they contended that the feu contract of 1797 was a *bonâ fide* transaction, under which the community of *Aberdeen* had possession for forty years and upwards. As to the salmon-fishings, the Appellants' counsel insisted that they were granted by reason of royal favour to the town of *Aberdeen*, which had possessed them without objection for forty years and upwards. And by the law of *Scotland* they urged that trustees were allowed to plead the negative prescription against the challenge of a transaction of forty years standing (1).

Mr. *Southgate*, Q.C., Mr. *Asher* (of the Scotch Bar, and Mr. *W. A. Hunter* appeared for the Respondents, and maintained that prescription could not be pleaded in answer to a charge of breach of trust: *Baird* v. *Magistrates of Dundee* (2); *Magistrates of Dundee* v. *Presbytery of Dundee* (3). The Respondents' counsel claimed also for the Respondents the arrears of the rents and profits which had been received by the magistrates and misapplied by them; and cases were cited as examples (4).

THE LORD CHANCELLOR (5):—

Your Lordships desired time for further consideration, not, I venture to think, from any doubt as to the conclusion at which you should arrive on the main question in the case, but in order that you might be the better prepared to dispose of what I may term a subsidiary question, which was raised, and I think raised for the first time, during the argument at your Lordships' Bar.

The action in the Court of Session against the *Aberdeen* Town Council had both declaratory and petitory conclusions. So far as the declaratory conclusions were concerned the nature of the case may be very shortly described. The principal officers of the corporation of *Aberdeen*, whom I will call for brevity the Town Council of *Aberdeen*, were the trustees of certain mortified funds which were intended to provide for the maintenance of two professors in the *Aberdeen* University. These mortified funds were laid out, together with other funds, which for the present purpose I will disregard, in the purchase of a certain property lying along the sea-coast in the neighbourhood of *Aberdeen*. Of that property, so far as it represented the mortified funds, the Town Council were undoubtedly trustees for the University and its professors. A considerable time ago, at the end of the last or the commencement of the present century, a transaction occurred the nature of which may be described in this way: A considerable part of the property had been feued off by the Town Council to various persons, but one portion of it, adjacent to the sea-coast, remained in their hands; and as to it, that which I may call little else than a ceremony, was gone through by which they proposed to sell it to a gentleman, who immediately afterwards declared that he had bought it as, and held it as, trustee for the Town Council. The result therefore was that the Town Council, being, as we should say, trustee of charity land, went through the form of selling that charity land to the corporation itself, feuing the land for £50 a year.

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(1) *Marshall* v. *Lyall*, February 18, 1859; 19 Dunlop, 626.

(2) 24 Dunlop, 447.

(3) 4 Macq. 228.

(4) *The York Buildings Company*, 3 Paton's Appeals, 378 and 579; *Jeffrey* v. *Aitken*, 4 Shaw, 722; *Taylor* v. *Watson*, 8 Dunlop, 400; *Gillies* v. *Maclachlan's Representatives*, 8 Dunlop, 487.

(5) Lord *Cairns*.

My Lords, very shortly afterwards the Town Council applied to the Crown, holding the right of salmon-fishing *inter regalia*, to grant to the Town Council, as the proprietors of this land, the right of salmon-fishing in the sea *ex adverso* the land in question, and they based their application upon a narrative which represented the Town Council as having acquired this land for the purpose of asking the right of salmon-fishing from the Crown, which was in the habit of giving the right of salmon-fishing to the proprietors of the riparian land. Thereupon, in accordance with what was the practice at that time, an Exchequer grant was made by the Crown of the salmon-fishing *ex adverso* nearly the whole, though not quite the whole, of the coast of the property to which I have referred.

Now my Lords, upon that part of the case I do not enlarge, because it is fully described in the very able judgment of the

Lord President (1), and your Lordships, I think, have no doubt that the transaction is one which would not for a moment be entertained by any Court as a dealing with trust property by a trustee. I refer, in the first place, to the feuing out of the land, which counts for nothing as against those who are beneficially interested. They are entitled to disregard it and treat it as if it never had happened. And then again with regard to the salmon-fishings, it is one of the first principles in regard to the doctrine of trusts,—a principle founded upon no technical rule of law, but upon the highest principles of morality,—that wherever a trustee, being the ostensible owner of property, acquires any benefit as the owner of that property, that benefit cannot be retained by himself, but must be surrendered for the advantage of those who are beneficially interested. Now it is perfectly apparent that this right of salmon-fishing was claimed by the Town Council because they were the owners of the land; it is perfectly apparent that it was granted to the Town Council because they were the owners of the land; it is perfectly apparent that it would not have been granted to them if they had not been the owners; and under those circumstances, it appears to me clear to demonstration that their reception of the grant of the salmon-fishings is exactly one of those benefits which came to them as the owners of the land, and must be surrendered for the advantage of those who really are the persons interested in the land.

My Lords, I will not detain your Lordships longer upon that part of the case. I agree with every word which fell from the Lord President in describing the case, and I did not really think that the very able counsel who appeared at your Lordships' Bar on behalf of the Town Council were otherwise than oppressed with the difficulty of the case which they had to argue.

But then, my Lords, there remain the petitory conclusions of the summons, in which the two professors, for whose advantage these funds were mortified—or, rather, I should say, one of the professors, and the representative of the other, who had died—claimed in their own person to have an accounting and payment of the real value of the lands and of the salmon-fishings in place of that feu duty of £50 a year which had annually been accounted for to them. With regard to these petitory conclusions, one question, and as it seems to me only one question, was really argued in the Court below. It was doubted whether the professors could join in this suit for the purpose of maintaining these petitory conclusions. The Court of Session held that they could so join; and I see no real or substantial reason why they could not join. With regard to the practice in this country, your Lordships are well aware that it is of every day's occurrence that you find an information dealing with a charity, filed by the Attorney-General, as representing the charity, and, coupled with that, a bill (the whole proceeding being termed an information and bill), by the individuals connected with the charity, who conceive that they have some claim to a personal and particular advantage from the charity. In principle it seems to me that exactly the same thing has been done in the present case. In *Scotland*, where it is not the habit for the Lord Advocate to sue as the Attorney-General sues in this country with regard to charities, the University may be taken as representing the general claim on behalf of the charity, and the professors joining in the petitory conclusions, represent the individuals who ask for the specific relief to which they claim to be entitled. Therefore, so far as the Court of Session held that the joining in these petitory conclusions was right, I think your Lordships will be disposed to agree with that view.

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(1) 4th Series of Scotch Cases, vol. iii. p. 1093.

But then it was said,—Here is an accounting directed for the profits of this land and fishing; and there is no limit assigned to it beyond, at the most, the Scotch limit of prescription—forty years; and it was urged that that might involve a very great hardship. Here (it was said) is a public body, who, whatever may be said of the authors of this transaction, are not affected by any personal culpability; and they have been from year to year dealing with the property of the Town Council upon the footing of that transaction. It may be that the money has all been spent; it may be (it was said), that there is no property of the Town Council to answer a judgment of the kind which would be given here; and it may be (it was further said), that the result will be, that the present members of the municipality, the town and community, will have to be taxed to make good money which was spent not by them but by those who went before them.

My Lords, I do not find that any argument upon this subject took place in the Court below, nor that any reference has been made to it in the condescendence or in the pleadings. I do not find even in the reasons of appeal before your Lordships' House, that any specific reference is made to the subject. There is no doubt that in *England* there have been many cases where upon reclamations made for the recovery of charity property which has been improperly applied, some consideration has been shewn in the decree with regard to the past expenditure of the charity money; and there have been cases in which the account of back rents or back receipts of the charity funds has been limited, sometimes to the period when first the misappropriation was challenged, and sometimes to the filing of the bill for the recovery of the charity estate. I do not find, so far as I have been able to investigate the subject, that there are any authorities (and none were cited at the Bar) in the Scotch law upon the subject. I do not wish, and I think your Lordships would not wish, to indicate any opinion whatever as to whether the doctrine which, in the way I have described, has prevailed in *England*, has ever been extended, or ought to be extended to *Scotland;* but I think it was certainly your Lordships' feeling that, without in any way prejudicing this question, or in any way using expressions which would indicate that your Lordships had any opinion formed upon the subject one way or the other, it might be desirable that the matter should, if it were possible to do so, be left open for further consideration by the Court of Session, in case it might appear to the Court of Session, upon their attention having been specifically directed to the subject, that any modification in the general account should be made with reference to the considerations to which I have adverted.

My Lords, any mode which your Lordships might adopt for effecting this purpose ought not in my opinion to affect in any way the costs of the litigation in this House. It appears to me that the appeal upon the grounds upon which it was brought has entirely failed, and I should submit to your Lordships that the interlocutor complained of should be affirmed with costs. But, in order that the Court of Session may have an opportunity of having their attention drawn to the question of the accounting, I should propose to your Lordships, in affirming the interlocutor of the First Division with costs, to remit the cause to the Court of Session with directions before proceeding with the accounting ordered by the interlocutor to allow the Appellants to amend the record and their pleas with reference to the extent of their liability to account, and to allow the Respondents to make such alterations as may be rendered necessary by those made by the Appellants, and thereafter to proceed further in the cause as shall be just, with power to dispose of all questions of expenses incurred under this remit. And I move your Lordships accordingly.

LORD HATHERLEY:—

My Lords, the magistrates of *Aberdeen* appear to have been trustees for certain endowed professorships of certain funds which were placed within their control for that purpose, just as in this country many corporate bodies, notably the corporation of *London*, are trustees for many great public charities, holding funds entirely distinct for those purposes. No doubt was raised in the argument of counsel upon the main part of the case as regarded the landed portion of the property.

But, my Lords, a subordinate question arose with respect to the fisheries. That question was whether, the fisheries being a subsequent purchase, made, as was alleged, out of the municipal funds, the corporation could not hold those fisheries independently of any principle which might be applicable to the general bulk of the property. There might be something to be said for that; and two cases were cited which seemed to have some bearing upon the present until all the facts were carefully weighed. But when you come to look at the representations made to the Crown anterior to this grant, you find that it is plainly and distinctly stated in those representations, that the very object of the corporation in obtaining the trust property was to have from the Crown the grant of these fisheries, because the Crown had laid down for itself the principle that it would make the grant of the fisheries to the persons holding the adjacent land. There was therefore a distinct and well-known benefit to be derived from the possession of the trust property, namely, the obtaining of a grant from the Crown of those fisheries in the seas adjacent to the trust property, which, according to the rule which the Crown has laid down for itself, were to be granted to the owners of the adjacent property. It was as owners of the trust property that the fisheries were granted to the corporation.

Now, my Lords, two cases—two remarkable cases I may say—were cited, but they appear to me to have no bearing upon the present case. The one was the case of *Hardman* v. *Johnson* (1), before Sir *William Grant*. The other case was *Acheson* v. *Fair* (2), before the late Lord *St. Leonards*. No doubt the authority of both those learned Judges is very great; and, had the circumstances been in any way really analogous to those of the case now before us, I might have paused before coming to a conclusion. But they were not analogous. The case reported in *Merivale* was the case of a purchase of a reversion of certain leasehold lands which, under the circumstances, were considered to be held upon a trust; that reversion was of those leaseholds together with many other properties which the parties who had purchased said they had purchased wholly irrespective of the trust on which a small part was held. The second case was a similar one; because there also the fact was that a reversionary interest in the land in question had been acquired with a large general purchase of land. Those being the special facts of those two cases it was attempted to draw a distinction in regard to them, and to take them out of the general rule which I have mentioned, namely, that a trustee cannot possibly derive any benefit from property which he holds in trust. If those cases went at all beyond that principle, I have no hesitation in saying that the cases must themselves be erroneous. But I am quite confident that neither of those learned Judges meant in any way to impugn the general principle I have mentioned; and I am quite confident that the decisions in those cases could not be applied to a case in which, according to the statement of the parties themselves, the benefit of the acquisition of the fisheries has been entirely derived from the possession of the trust property; and the trust property was really acquired for the very purpose of getting those fisheries. Therefore the case, as regards this part of it, is one of the simplest and plainest that could be brought before your Lordships for decision.

The other part of the case I confess would have caused me some difficulty, because in truth we are so little provided with materials with reference to the back account for a period of forty years; we have not had any argument before the learned Judges in the Court below, or their opinions, which would be the most valuable aid, of course, that could be afforded us; and we have not had the point raised clearly and distinctly upon the pleadings before us. Under all the circumstances the course suggested by my noble and learned friend on the woolsack seems to me to be the only one which it is competent for your Lordships to adopt.

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(1) 3 Mer. 347.

(2) 3 Drury & War. 512.

Lord O'Hagan:—

My Lords, I am of opinion that the unanimous judgment of the Lord Ordinary and the Court of Session, on the first point in this case, should be sustained; and that the judgment of the Court of Session on the second point, in which it conflicts with that of the Lord Ordinary, should also be sustained.

On the first point, I think there is really no room for doubt. There is admittedly a trust estate. The Appellants are trustees and the Respondents are *cestuis que trust* under certain deeds of mortification executed in the early part of the seventeenth century. The predecessors of the Appellants administered their trust faithfully until the year 1797. But the officer who acted for them in the administration, who was called the Master of Mortifications, on the 14th of September in that year, conveyed lands which were so held in trust, in consideration of a feu-duty of £50 a year, to their own treasurer, after a sale at which their own provost presided, for their present benefit and with a purpose of further aggrandising their corporation. Ever since, they have kept possession of the property and the advantages accruing upon that possession; and the Respondents now impeach the sale as absolutely void, and claim that the trust shall be executed and the trust estate enjoyed by the beneficiaries to whom it was destined by the deeds of mortification.

It seems to me that the simple statement of the facts of this strange and indefensible transaction is sufficient to stamp it with illegality. The principle which forbids a trustee "to traffic in his trust" belongs to the jurisprudence of all nations. It is equally effective in *Scotland* as in *England*. "Tutors and their factors"

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(says Lord *Stair*) "are presumed to do that, to the behoof of the pupil, which they ought to do; and though it be done '*proprio nomine*' it accresceth to the pupil." And in this case the law of *Scotland*, equally with the law of *England*, condemns the misuse of a fiduciary position, and declares that the advantage wrongfully gained by the trustee shall enure, not to his benefit but to that of the *cestui que trust*. It will not tolerate an attempt to employ a power, created in the expectation of its honest exercise, for the betrayal of those whom it was designed to protect. The Appellants contended that, whatever might have been the weakness of their title when it was created, the lapse of time had given it validity. But the trust was express. It was violated by the trustees for their own benefit and to the injury of the *cestuis que trust;* and there is no principle in the law of *Scotland* which permits lapse of time, under such circumstances as exist in this case, to validate a transaction so essentially illegal and void. In this conclusion all the Judges have concurred; and your Lordships can have no hesitation in adopting it.

I think you may have as little, in affirming the judgment of the majority as to the fishings. The ruling of the first point seems to me to rule the second; and if the lands are affected by the trust so as, notwithstanding the nominal transfer of title and the great lapse of years, to belong still to the beneficiaries, the fishings appear to me to be affected in the same way and with a like result. The breach of trust which is now confessed was committed for the purpose of securing a right to the fishings. The Corporation declare over and over again that they contracted for the lands illegally, and paid, through their treasurer on the one hand and their master of mortifications on the other,—that is from themselves to themselves,—the stipulated price, with the express view of obtaining a grant of the sea-fishings *ex adverso* of those lands. The petition to the Lords of the Treasury for a grant of the fishings rests the claim to it on the fact that the lands, so illegally obtained, were opposite to those fishings. The report of the Exchequer Judges, authorizing the grant, relies on the adjacency of the purchased lands as being its proper warrant, and the right is conferred by the Crown "*in mari adjacente terris.*" Therefore it is plain that the land was unlawfully purchased by the trustees for the purpose of founding a claim to the fishings; that the possession of that land was made the ground of the claim and admitted as such by the Crown; and that, without the land so acquired by an admitted breach of trust, no grant of the fishings would have been obtained.

It is true, as the Lord Ordinary has said, that "the fishings were undoubtedly granted to the burgh, and the Crown is not seeking on the ground of misrepresentation, or on any other ground, to rescind the grant." But, if the grant was plainly made, because of the possession of lands which would have given a right to the beneficiaries, and gave no right whatever to the trustees, to whom it was unlawfully conceded, why should not the restoration of the land to its true owners involve the restoration of the fishings, which the trustees managed to obtain by the false pretence of a title which never belonged to them? Confessedly, if the true state of the case in fact and law, as it has been established by the Court of Session, had been known, the practice of the Crown would have given the fishings to the *cestuis que trust*, as the adjacent proprietors, and not to the trustees who had, legitimately, no interest, corporate or personal, in the matter. And if your Lordships should be right in holding, as to the first branch of the case, that the lapse of time does not alter the rights of the parties, what belonged to the *cestuis que trust* in 1801, belongs now to their successors: and the fishings should be held subject to the trusts of the mortifications as well as the land, in virtue of the possession of which those fishings were manifestly granted. Without the land, the corporation would not have got the fishings; and if their title to the land is void, their title to the fishings must fail along with it.

We must deal with the land and the fishings on the same principles; and the benefit which has arisen in connection with, and by reason of, the possession of the trust estate, which belonged to the beneficiaries and not to the trustee, under the mortifications, must go to those who represent the beneficiaries. We must hold that the trustee secured that advantage, not for himself, but for those whose interests he was bound to guard, in utter forgetfulness of his own. It would be a reproach to the law, if it were powerless in such a case to prevent a trustee from "making commodity of his own wrong," and holding a property he had gained only by a gross breach of duty. But it is not so: and your Lordships will again enforce the doctrine declared by a distinguished Scottish Judge (1) who was once a member of this House, in the case of *Laird* v. *Laird* (2): "The law will ever presume that the trustee intended that the profits should go to the beneficiary rather than presume that he intended his own aggrandisement at the risk or expense of the beneficiary."

As to the petitory conclusions, I think that your Lordships will do well to adopt the proposal of my noble and learned friend on the woolsack, and for the reasons he has given.

LORD BLACKBURN:—

My Lords, I also am of opinion that upon the main question there can be no doubt that the judgment of the Court below ought to be affirmed. Upon that I will say no more than that I think the reasoning given in the very clear judgment of the Lord President is quite irresistible.

Upon the minor point of the petitory conclusions, with regard to the question as to how far it is right that the account should go back, I quite agree with the Lord Chancellor that it is hardly raised by the record, and that it has hardly been considered below. The hardship upon either side is very obvious. On the one hand, the Appellants being a fluctuating body, if the result of taking an account back for forty years is to make the occupiers of rateable property in *Aberdeen* in 1877 pay the money that has been spent by their predecessors in 1837 and downwards, the hardship is great. On the other hand, the hardship is obvious and great if the professors, or the representatives of the professors, who ought to have had that money, lose it because they did not know that they ought to have had it. I do not think that question has been properly raised or considered. It is very desirable that the rule, whatever it may be, should be ascertained, and therefore I entirely concur in the propriety of the remit which, as I understand it, will leave the Court of Session at liberty to consider the question, and to do what, after considering the principles of Scotch

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(1) Lord *Colonsay*.

(2) 20 Dunlop, 981.

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law and the decisions in *Scotland*, if there be any, shall seem to them to be just and right.

LORD GORDON:—

My Lords, I am happy to say that the views which your Lordships are now adopting are quite in accordance with the principles of Scotch law. In fact, our Scotch law is founded on the civil law, and has adopted to the full extent the restriction upon any dealings on the part of trustees with trust property. That principle had been applied in several Scotch cases, even before the question was raised in *England*. I have no doubt whatever, therefore, that your Lordships are dealing correctly in affirming the judgment upon the declaratory conclusions.

The petitory conclusions may admit of some further discussion; and I think an indulgence is conceded to the Appellants in this case in allowing them to have an opportunity of stating more fully the facts of the case which are necessary to raise some of the arguments which were submitted to your Lordships from the Bar. It is quite clear that upon the record there are neither statements of fact nor pleas in law sufficient to support those arguments; and it would not be safe for your Lordships to deal with this branch of the case upon the very meagre argument which was submitted at the conclusion of the case. I think, therefore, that your Lordships will deal correctly in remitting the cause to the Court below, giving power to the Court below to allow amendments upon the record with regard to any questions which may be raised as to the extent of the accounting under the judgment upon the petitory conclusions. Of course the remit will be expressed in such terms as will leave the matter perfectly open to the Court below, for your Lordships have not expressed any opinion with reference to what may be the views that you might be ultimately inclined to take in regard to the case when it shall be matured by the amendments.

Ordered and adjudged, that the interlocutor of the Lords of Session of the First Division of the 18th of July, 1876, complained of in the said appeal, be and the same is hereby affirmed, except as regards the extent of the liability to account; and as to such accounting, and without prejudice to any question, it is ordered and adjudged that the cause be remitted back to the Court of Session with directions, before proceeding with the accounting ordered by the said interlocutor, to allow the Appellants to amend the record and their pleas with reference to the extent of their liability to account; and to allow the Respondents to make such alterations as may be rendered necessary by those made by the Appellants; and thereafter to proceed further in the cause as shall be just; with power to dispose of all questions of expenses incurred under this remit: And it is further ordered, that the Appellants do pay or cause to be paid to the said Respondents the costs incurred by them in respect of the appeal.

Agents for Appellants: *Martin & Leslie.*
Agent for Respondents: *William Robertson.*

[PRIVY COUNCIL.]

J. C.*
1877
April 24.

BELL AND OTHERS . . . . APPELLANTS;

AND

THE MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT AT VICTORIA.

Victoria Act, No. 388—*Succession Duty.*

10 Ch D. 282

A testator having died whilst Act No. 388 was in force, and probate to his will having been applied for and granted before Act No. 523 was passed, but after the time fixed for its coming into operation retrospectively :—

Held, that the duty payable on the testator's estate under the former Act having been directed by sect. 10 thereof to be deemed a debt of the testator to Her Majesty, accrued due *eo instanti* on his death, at the rate prescribed by that Act, although the amount of such duty might have to be subsequently ascertained.

Probate duty in *England* is a stamp duty payable upon the value of the property the subject of the probate at the time it is granted. The duty payable under Act No. 388 is more in the nature of a succession duty, payable, whether probate is sought or not, on the value of the estate at the time of the testator's death.

APPEAL from an order of the Supreme Court of *Victoria* (Sept. 26, 1876), reversing an order of Mr. Justice *Molesworth* (Aug. 8, 1876), by which the rule *nisi* hereafter mentioned was made absolute.

The Appellants were the executors and trustees of the will of *John Bell*, deceased, and the Respondent is Master in Equity of the Supreme Court of the Colony of *Victoria*.

The testator died on the 27th of January, 1876, leaving a will and codicil, dated respectively the 10th of December, 1874, and the 11th of January, 1876. He left a widow, entitled to certain property under the will; but no child, or children, or grandchildren. Certain persons other than the widow of the testator were entitled to property under the will.

Probate of the will and codicil was on the 30th of March, 1876, granted by the Supreme Court to the Appellants, who on the 28th of June, 1876, filed in the office of the Master in Equity the statement required by the *Duties on Estates of Deceased Persons Statute*, 1870.

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* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

It appeared by that statement that, after deducting the amount of the debts due by the deceased from the value of the estate, there remained a balance of £300,877. 7*s.* 5*d.*, and by a memorandum at the foot of the statement it appeared that it had been certified in the office of the Master in Equity that the amount chargeable with duty under Act No. 523 was the sum of £267,917. 7*s.* 5*d.* at 10 per cent., and the sum of £32,960 at 5 per cent. under sect. 24 of Act No. 388.

The Master in Equity required the executors to pay to him duty under and according to the schedule to and under the provisions of the *Duties on Estates Amendment Act*, 1876 (Act No. 523), calculated upon the final balance appearing upon the statement. The executors, on the other hand, submitted and insisted that as the testator died before the coming into operation of the last-mentioned Act, the duty was payable under and according to the schedule to and under the provisions of the former and not of the latter Act.

Upon the 18th of July, 1876, the Appellants obtained a rule *nisi* in the Supreme Court of the Colony of *Victoria* (Probate Jurisdiction) ordering the Respondent to shew cause why an order should not be made directing the Respondent forthwith to issue probate of the said will to the Appellants upon payment by them under and according to the schedule to and under the provisions of the *Duties on the Estates of Deceased Persons Statute*, 1870, and not under and according to the schedule to and under the provisions of the *Duties on Estates Amendment Act*, 1876 (Act No. 523).

On the 8th of August, 1876, by order of that date, made by his Honour Mr. Justice *Molesworth*, the rule *nisi* was made absolute. For the judgment of *Molesworth*, J., see *In re John Bell* (1).

On the 26th of September, 1876, the Supreme Court reversed the last-mentioned order without costs. Leave was subsequently given to appeal to Her Majesty in Council therefrom.

Mr. *Benjamin*, Q.C., and Mr. *J. D. Wood*, for the Appellants, said that the point to be argued was whether the estate of a testator who died before the local Act No. 523 came into operation, but probate of whose will was not granted till after the said Act came into operation, is to pay duty at the rate imposed by local Act No. 388, or at the increased rate imposed by Act No. 523. They contended that the judgment of *Molesworth*, J., was correct, and that the duty should be paid according to the schedule to Act No. 388. The later Act, intituled the *Duties on Estates Amendment Act*, 1876, was a statute increasing, and that retrospectively, the pecuniary burdens of Her Majesty's subjects, and therefore should be construed strictly. The language of sect. 1 thereof would be satisfied if construed to mean that the Act should take effect on and from the 24th of February, 1876, upon the estates of persons dying on or after that day. And sect. 8 of Act No. 388, enacting that "the duty payable under this Act shall be deemed to be a debt of the testator or intestate to Her Majesty," shews that the duty becomes due (though it is not payable) at the death of the testator or intestate, and therefore the rate of duty in force at the time of such death, and not at the time of the granting of probate or letters of administration, is to be regarded: see *In the Matter of Cornwallis's Estate* (1), which was a case under 36 Geo. 3, c. 52, s. 8, and the *Succession Duty Act*, 1853 (16 & 17 Vict. c. 51, s. 51.)

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(1) 2 Vict. L. R. Insol. Prob. & Mat. p. 71.

Mr. *Cotton*, Q.C., Sir *James Stephen*, Q.C. (Mr. *C. Bowen* with them), for the Respondent, contended that upon the right construction of the two local Acts the Appellants ought to pay duty according to the schedule of the latter and not the former Act.

The duty on estates of deceased persons is payable under the Acts in force at the time of the date of the order for probate, or of the grant of probate, irrespective of the time of the death of the testator; and although *John Bell* died before the coming into operation of Act No. 523, the grant of probate was made subsequent to its coming into operation. In English law the value of the estate which pays duty is taken as existing at the time of application for probate; the principle to be followed and the rule to be applied are laid down by Lord *Cairns* in *Attorney-General* v. *Partington* (2); see also the cases there cited; see also *Williams* on Executors [Ed. 1873], p. 616; *Doe* d. *Richards* v. *Evans* (1). In this case the date at which the rate of duty payable is to be assigned depends upon the provisions of the local Acts.

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(1) 11 Exch. 580.

(2) Law Rep. 4 H. L. 122.

Mr. *J. D. Wood* replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an appeal against an order of the Supreme Court of the colony of *Victoria* reversing an order of a single Judge (Mr. Justice *Molesworth*), whereby the Master in Equity of the Supreme Court was directed forthwith to issue probate of the will of Mr. *John Bell* to his executors (the Appellants) upon the terms therein mentioned. The only question between the parties was whether the property left by the testator was to pay the higher legacy duty imposed by one of the Colonial Acts or the lower duty imposed by another.

The facts material to the decision of the case are these. The testator died on the 27th of January, 1876. An application was made for probate, and probate was granted on the 30th of March, 1876. A certain statement required by statute was filed on the 28th of June, 1876, and probate, though granted before, was actually issued after that. At the time of the death of the testator, the Act in force was No. 388 of 1870; but in the year 1876 another Act was passed, which is to be read with the former Act, and this Act was passed on the 7th of April, 1876; but there is a provision in it that it is to take effect retrospectively as far back as the 24th of February, 1876. It appears, therefore, that the testator died while the first Act was in operation, and that probate was applied for and granted before the second Act was passed, but after the time fixed for its coming into operation retrospectively.

The Act, No. 388, is intituled "An Act to enforce and collect Duties on the Estates of deceased Persons," and among other provisions enacts (sect. 7) that "every executor shall within the prescribed time from the granting of probate or letters of administration to him, or such further time as the Master may allow, file in the office of the Master a statement specifying the particulars of the personal estate of or to which the deceased was at his death possessed or entitled, and of the real estate comprised in such will and the value thereof, and of the duties due by the deceased, distinguishing between secured and unsecured debts, and stating the nature of the security held for the same and the estimated value of such security, and shewing the balance remaining. Then sect. 8 says, "Except as herein otherwise provided there shall be paid to the Master, to be paid by him into the consolidated revenue of *Victoria*, by every administrator, executor, administrator with the will annexed, administrator of freehold lands, and heir-at-law, the duty mentioned in the schedule to this Act, which shall be calculated upon the final balance appearing upon his statement." This, their Lordships observe, appears to be an Act for the purpose of enforcing duties to the State upon the estates, whether real or personal, of all persons deceased; the duties cannot strictly speaking be called probate or administration duties; they are more in the nature of succession duties, although the word "succession" is not used. If no administration is taken out, and if there be no executor who seeks for probate, nevertheless the estate must pay duty, for by sect. 9 the rules may prescribe the time of notice after which the duty payable under this Act must be paid, and if it be not paid the Master may apply to the Supreme Court, and it may order part of the testator's property to be sold.

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(1) 10 Q. B. 476.

Then comes a provision which seems to their Lordships very material. The 10th section enacts, "The duty payable under this Act shall be deemed a debt of the testator or intestate to Her Majesty, her heirs, and successors, and shall be paid by any executor or administrator with the will annexed out of the personal estate of the testator, after payment of the testamentary and funeral expenses, in priority to all debts of the testator; and if the personal estate is insufficient to pay such debt, the executor or administrator with the will annexed or any person interested may apply to the Supreme Court, which may order that a sufficient part of the real estate of the testator may be sold to pay the said duty."

Here the legislature in express words declares that the duty payable shall be deemed a debt of the testator to Her Majesty. The High Court, which reversed the decision in favour of the Plaintiff of Mr. Justice *Molesworth* in the Court below, treat the language of the section as if it had been "The duty payable under this Act shall be a debt of the testator." They observe that these words enact what is impossible, and must therefore receive some construction other than that which would be put upon them according to ordinary rules. But the words have not been correctly quoted by the Supreme Court. These words are, "The duty payable under this Act *shall be deemed* to be a debt of the testator," not an uncommon expression in Acts of Parliament, the meaning of which here is that although in strictness of language it was not actually a debt of the testator during his lifetime, it shall be deemed and taken to be such for the purposes of the Act, *i.e.* for the purpose of giving it a certain priority, and possibly for the purpose of preventing any dispute as to the time from which it shall be reckoned. In other words, the Legislature declare the duty to be a Crown debt accruing *eo instanti* at the death of the testator. It follows that on the 27th of January, 1876, when the testator died, there was an actual debt to the Crown, a debt in the calculation of which the principal factor was ascertained—the rate of duty to be paid. The only other factor was the amount of property upon which that duty was to operate, which might or might not have been ascertained at the time. If that amount was then known, the debt to the Crown could have been immediately expressed in figures; if not, further time would be required for ascertaining the nature and extent of the property, not the rate of duty. The Act passed in the April following, and had a retrospective effect, but that retrospective effect is stated to be the 24th of February, and did not affect a Crown debt which was really due on the 27th of January.

Their Lordships are of opinion that this case should be decided upon the terms of the Colonial Act, which are undoubtedly very special, and that recourse to the law of this country is not essential for its determination. With reference to an analogy which has been drawn between this duty and the probate duty in *England*, it may be enough to observe that the probate duty in *England* is a stamp duty, payable on what is supposed to be the value of the property the subject of the probate at the time it is granted. It was said in a case of the *Attorney-General* v. *Partington* (1), by Baron *Bramwell*, "It was rightly said by Mr. *Lush* that probate or administration duty is a duty which attaches upon the estate and effects of the testator or intestate at the time of his death, but is to be calculated upon the value of the estate at the time probate or administration is granted." Whether the calculation of the colonial estate duty differs from that of the probate duty or not, on the ground that the words which have been referred to in the 7th section of the colonial Act require the second factor in the calculation of duty to be the value of the estate at the time of the death of the testator instead of at the time of the application for probate, it is not very material to inquire; but there would appear to be this rule common to both, that the duty attaches upon the estate and effects of the testator at the time of his death. Their Lordships, however, do not think it necessary to refer further to the English law than to mention one case, which appears to have a good deal of bearing upon this, viz., the *Estate and Effects of the Earl of Cornwallis* (1). It seems that a testator died, having bequeathed certain annuities, on the 21st of May, 1852. The *Succession Duty Act* passed on the 19th of May, 1853, and came into operation on that day. The 31st section of that Act says: "Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the 36 Geo. 3, c. 52, and such annuity or interest shall be chargeable with duty accordingly." It was argued that the *Succession Duty Act* having come into force, and declaring that all legacy duty should be calculated upon certain tables different from those which previously prevailed, the duty in this case was to be calculated upon the new tables; but it was held by the Court that although the calculation was not made till after this Act came into operation, still, the testator having died before it came into operation, the calculation was to be made on the tables in force at the time of his death. Mr. Baron *Martin* observes, "At the time of the testator's death a certain amount of duty became payable, and we ought not, without clear language, to hold that another amount is payable;" and finally the Court thought that "the 31st section must be applied only to annuities

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(1) 1 H. & N. 474.

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(1) 11 Ex. 581.

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given after the 19th of May, 1853." That case appears to their Lordships to have a very strong bearing upon the present.

On the whole, their Lordships are of opinion that the order of Mr. Justice *Molesworth* was correct, and the order of the Supreme Court was erroneous; and they will humbly advise Her Majesty to reverse that order, and in lieu thereof to direct that the appeal against the order of Mr. Justice *Molesworth* do stand dismissed, and the latter order affirmed, without costs to either party. The Appellants, however, must have the costs of this appeal.

Solicitors for the Appellants: *Sladen & Mackenzie.*
Solicitors for the Respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.*
1877
April 27, 28.

THE DIVISIONAL COUNCIL OF THE CAPE DIVISION . . . . DEFENDANTS;

AND

DE VILLIERS . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Cape of Good Hope Act, No. 10 *of* 1864—*Curators of Public Roads—Compensation.*

The Respondent being proprietor of a certain perpetual quit-rent tenure, the Appellants as curators of public roads under Act No. 10 of 1864, and possessed under sect. 3 of all the rights which were vested in the Commissioners of Roads by Act No. 9 of 1858, contended that they had a right to enter the Respondent's land and take away gravel for the repair of public roads:—

Held, that such contention was correct. Under the terms of the Respondent's grant, and by established usage, the Government had such right, and under the Acts above mentioned such right had been transferred to the Appellants.

Semble, if the gravel had been taken from land of the Respondent which had been improved by cultivation, irrigation, or otherwise, he would have been entitled to compensation under sect. 12 of Act No. 9 of 1858, to be estimated in the manner provided by that section.

APPEAL from a judgment of the Supreme Court of the *Cape of Good Hope* (June 10, 1875) in favour of the Respondent, by which the Appellants were ordered to pay to the Respondent £25 by way of damage for removing from certain perpetual quit-rent lands, the property of the Respondent, certain gravel, stones, and earth, for the purpose of repairing the main road, called the *Wellington Road*, and were restrained by perpetual interdict from again entering upon the said land of the Respondent without his licence, and from removing therefrom any gravel, stones, earth, or other matter or things, and were further ordered to pay the costs of suit.

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

It was, on the trial, shewn that the land in question, on which the alleged trespass was committed, was land granted on perpetual quit-rent, in the Dutch version termed "*Erfpacht*," to one *Jan Albertus Dell*, on the 30th of May, 1815, which was duly transferred to the Respondent on the 17th of February, 1866. In the original deed of grant of the said land, by Lord *Charles Somerset*, Governor of the Colony of the *Cape of Good Hope*, the same was limited, subject to certain conditions therein mentioned; and further, "the land thus granted" was described as "being further subject to all such duties and regulations as either are already, or shall in future, be established, respecting lands granted under similar tenure."

Prior to the 6th of August, 1813, an ordinary way of disposing of Crown lands in the Colony of the *Cape of Good Hope* was by means of loan, in which case no title was registered; but on the 6th of August, 1813, a public proclamation was issued in the Colony of the *Cape of Good Hope* by the then governor thereof, Sir *John Francis Cradock*, having the force of law, reciting, among other things, that although the establishment of loan leases might have been suitable to the early state of the colony, when the wants of Government were not foreseen, it then appeared from experience that the loan tenure was injurious to that certainty so essential to the happiness and the interest of the inhabitants, and equally injurious to the public interest by preventing the holders from appropriating as much of their means to the improvement and extension of agriculture as they would do in case they had no right of re-assumption to apprehend, and might dispose of the ground as they pleased, by subdividing the same among their children, letting, selling, or otherwise alienating it in lots, culti-

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vating it in the prospect of remote benefit by the planting of timber, &c.; and that, notwithstanding a gradual re-assumption of loan lands, and the regranting of the same in lesser portions on a more certain tenure, might considerably increase the colonial revenue, yet that, having taken into consideration the great utility of no longer delaying the improved cultivation of land by giving security to title, and of making the same, as speedily as possible, a general measure, the Governor, Sir *J. F. Cradock*, had adopted the following determination: To grant to the holders of all lands on loan, who might regularly apply for the same, their places on perpetual quit-rent (*Erfpacht*), with the following rights and privileges, and on the following terms and conditions, namely. . . . And then followed seventeen sections of the Proclamation, to all of which it is not for the purposes of this report needful to refer. By the fourth of those clauses, however, it was proclaimed that "Government reserves no other rights but those on mines of precious stones, gold, or silver, as also the right of making and repairing public roads, and raising materials for that purpose on the premises, other mines of iron, lead, copper, tin, coals, slate, or limestone are to belong to the proprietor."

Mr. *Butt*, Q.C., and Mr. *Griffith*, for the Appellants, contended that the land in question on which the alleged trespass was said to have been committed was and is land held on perpetual quit-rent tenure (in *Erfpacht*), and was and is subject to a condition that materials might be raised thereout by the proper parties for making and repairing public roads, and that the Appellants were the proper parties for repairing the same, and that their raising of gravel, which was the trespass complained of, was as materials for that purpose, and not otherwise.

Since the date of the Proclamation of 1813 no instance is shewn in which the Crown has ever enforced any other right than those mentioned in the said fourth clause over lands granted in perpetual quit-rent (*Erfpacht*), whether originally granted as such or converted from loan places, but these rights have been continuously exercised, and until the present case apparently without any dispute on the part of any holder of any perpetual quit-rent land, whether originally granted as such, or converted from loan place. By virtue of the Act of the Colonial Parliament, No. 9 of 1858, sect. 11, the Commissioners of Roads therein mentioned, or other officer by them duly authorized, were invested with all the legal rights belonging to the Government of the said colony in respect, among other things, to the raising and carrying away materials for making and repairing public roads. By virtue of the Act of the Colonial Parliament, No. 10 of 1864, sect. 3, every Divisional Council was thereby invested, for the purposes of the said Act, which were for the construction and maintenance of the main roads of the colony, with all and singular the rights, powers, and authorities set forth in the 10th, 11th, 12th, and 13th sections of the Act No. 9 of 1858, precisely as if such Divisional Council were the Commissioners of Roads in the said sections mentioned or one of such Commissioners.

The Respondent did not appear.

The judgment of their Lordships was delivered by

Sir Barnes Peacock:—

The Appellants in this case were the Defendants in a suit brought against them by the Respondent, who sought to recover against them damages for having entered his land and taken away gravel. The Defendants justified upon the ground that they had a right to take it for the repair of a certain public road; and the question is, whether the Defendants were justified or not in entering upon the Plaintiff's land and taking away the gravel. The Plaintiff is the proprietor of a certain perpetual quit-rent tenure, and the Defendants are the curators of the public roads under Act No. 10 of 1864, by sect. 3 of which they have all the rights which were vested in the Commissioners of Roads by the Colonial Act, No. 9 of 1858. By the 11th section of that Act it was provided that, "For the purpose of making any such main road the aforesaid Commissioners of Roads or other officer by them duly authorized are hereby invested for the purpose of so doing with all and singular the legal rights, if any, belonging to the Government of this colony in respect to the taking of any land and the raising and carrying away materials for making and repairing public roads, whether such rights have been preserved

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to the said Government by the proclamation of His Excellency Sir *John Francis Cradock,* bearing date the 6th day of August, 1813, permitting the conversion of lands on loan into places on perpetual quit-rent, or have been created by express stipulation or condition in any grant of freehold property, or exist in any other way or manner whatsoever."

The question, then, resolves itself into this: Had the Government the power to take gravel out of this land, which was held upon a perpetual quit-rent tenure: and that depends upon the grant itself and upon the proclamation of the Government of the 6th of August, 1813. The grant is to *Jan Albertus Dell,* of whom the Plaintiff was the transferee, of a perpetual quit-rent tenure, "subject to all such duties and regulations as either were then already or should in future be established respecting lands granted under similar tenure." The learned Chief Justice in delivering his judgment has shewn that the term by which quit-rent has always been known in the colony is "*Erfpacht,*" which is the term applied to the *Emphyteusis* of the Roman-Dutch law, and was also the term used in the Dutch version of the Proclamation, in the grant in question, and in all quit-rent grants, which prior to the year 1822 were made out in both the Dutch and English languages. The *jus emphyteusis* did not give the *Emphyteuta* the right of taking away gravel or minerals. The Proclamation of 1813 says, "Every holder of a loan place, on his making application by memorial to Government for the purpose, shall have a grant of this place on perpetual quit-rent to the same extent as he has hitherto legally possessed the same on loan." By clause 3, "The holder by this grant shall obtain the right to hold the land hereditarily, and to do with the same as he may think proper in like manner as with other immovable property, as also, should he deem it advisable, to sell or alienate it." Then by clause 4, "Government reserves no other rights but those on mines of precious stones, gold, or silver, as also the right of making or repairing public roads and raising materials for that purpose on the premises," and so on. Then by sect. 11, "This perpetual quit-rent shall further not be liable to any further burdens but those to which all freehold lands are already subject"—that is, subject to the reservations which are expressed in this Proclamation;—

"the perpetual quit-rent shall not be liable to any other burthens but those to which all freehold lands are already subject." Then by clause 6 it is provided that "In all judicial decisions regarding quit-rent the same rights, laws, and usages shall be observed which have hitherto been acted upon or which may hereafter be established, enacted, and followed in judicial decisions with respect to freehold lands." That must also mean subject to the reservations contained in the Proclamation. Their Lordships have arrived at the conclusion that the view of the case which was taken by the learned Chief Justice in the Court below was a correct one, namely, that the grant to *Dell* was subject to the reservation by Government of the right to raise and take gravel for repairing the public roads. The Plaintiff's own witness, Mr. *De Wet*, says: "I have been chief clerk in the Surveyor-General's office for about thirty-three years. I do not remember that the right of the Government to take gravel from quit-rent land, originally granted as such, was ever disputed." Therefore, whether the land was quit-rent granted in lieu of loan land, or of quit-rent originally granted, the same rule seems to have prevailed under the Proclamation. *Leopold Marquard*, another of the Plaintiff's witnesses, said: "There is no difference in the form of tenure between loan places converted into quit-rent and those originally granted as such." Therefore, not only by the terms of the grant as construed by the Chief Justice, but by the usage, the Government seems to have had the right of taking gravel, and that right has been transferred to the Divisional Council of the Cape Division by the two Acts to which allusion has been made.

In these circumstances their Lordships think that the decree of the Court below must be reversed. The Plaintiff asks in his plaint that in case it "shall be found that the Defendants have any right to remove gravel, stones, earth, or other matter or things from the said land, it may be declared by this Honourable Court that such right cannot be exercised with respect to cultivated, arable, or sowing land without compensation to the Plaintiff." The learned Chief Justice in his judgment says: "There can be no objection to a judicial declaration to the effect that the Defendants are not entitled to take materials from such portions of the Plaintiff's land as have been improved by cultivation, irrigation, or otherwise, without compensation to the Plaintiff, such compensation to be determined in the manner provided for by the 12th clause of Act No. 9 of 1858." Their Lordships are of opinion that if the gravel was taken from land which had been so improved the Plaintiff would be entitled to compensation, but in his suit he does not allege that the gravel was so taken. The case for damages is for taking the gravel from his land; he does not say that the gravel was taken from land which had been improved, and that the Defendants had taken it without giving proper notice or offering compensation. Their Lordships do not think that this is a case in which there is any necessity to make a declaration of right in their decree, although they think it right to say that if the gravel was taken from cultivated land, the owner of the land would be entitled, under sect. 12, to receive compensation, to be estimated in the manner provided by that section.

Under all the circumstances their Lordships will humbly advise Her Majesty that the decree be reversed and the suit dismissed, and that the Respondent do pay the costs of this appeal.

Solicitors for the Appellant: *Venning, Robins, & Venning.*

[PRIVY COUNCIL.]

J. C.*
1877
May 14.

MAYOR AND CORPORATION OF ESSENDEN AND ANOTHER . . . . APPELLANT;

AND

BLACKWOOD (CHAIRMAN OF THE VICTORIA RACING CLUB) . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victoria Local Government Act, 1874, s. 253—*Racecourse—Rateability—Victoria Racing Club Act,* 1871.

In *Victoria* the exemption of Crown property from rateability is defined and limited by express enactment; and under the *Local Government Act,* 1874, s. 253, includes "land, the property of Her Majesty which is unoccupied or used for public purposes, land in the occupation of the Crown or the Government of *Victoria.*"

A racecourse held by the Respondent under a demise from the Crown in trust for a racing club, and for the purposes of the *Victoria Racing Club Act,* 1871, whether or not it continued to be the property of the Crown within the meaning of the above section, is not land used exclusively for public purposes, and therefore is not exempted. There was on the part of the club, according to the true construction of their Act, a beneficial enjoyment of the land beyond that of the general public, and a pecuniary interest in the surplus, rents, and profits of the racecourse, after providing for its maintenance and use.

APPEAL from a rule or order of the Supreme Court of *Victoria* (July 4, 1875).

The Respondent, the duly appointed chairman for the time being of the *Victoria Racing Club,* was lessee for the term of ninety-nine years of certain lands and premises demised by the Crown to the Respondent and his successors in the office of chairman in trust for the *Victoria Racing Club.* The demise hereinafter set forth was authorized by, and was duly made under, sect. 8 of the *Victoria Racing Club Act,* 1871 (35 Vict. No. 398).

On the 20th of March, 1876, the Appellants made a rate upon the land and premises so demised on the sum of £2500 as the net annual value, the property being described in the said rate as "712. Trustees of Racecourse—Racecourse." The Respondent appealed against this rate, and the appeal came on for hearing at the general sessions, held at *Melbourne*, on the 1st of May, 1876, when the sessions allowed the appeal on the ground that the land rated was Crown land, and was held by trustees for public purposes solely, and stated a case for the opinion of the Supreme Court as to whether the order of the sessions was right in point of law.

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The Supreme Court affirmed the decision of the sessions on the grounds, (*a*) That the right of property in the Crown was not diverted by the demise to the Respondent; and (*b*) That the land was used for public purposes, and that the land was therefore exempt from rating under sect. 253 of the *Local Government Act*, 1874 (38 Vict. No. 506) (1).

The demise from the Crown for ninety-nine years of the racecourse to the Respondent was in the following terms:—

"*Victoria* by the grace of God, &c. To all to whom these presents shall come, Greeting:

"Whereas, by the *Victoria Racing Club Act*, 1871, it is amongst other things in effect enacted that it shall be lawful for us from time to time to demise to the chairman for the time being of the *Victoria Racing Club* for any term of years in trust for the said club, and for such chairman and his successors in office to hold by such demise from us for the purposes of the said Act, the land intended to be hereby demised. And whereas *James Blackwood*, of *Melbourne*, in the colony of *Victoria*, esquire, is the chairman for the time being of the said *Victoria Racing Club*, and a memorial of his name, and of each of the members of the committee respectively, is duly recorded according to the provisions of the said Act, in the Supreme Court of the colony of *Victoria*.

"Now know ye that in pursuance of the provisions, and for the purposes of the said Act, we do hereby demise unto the said *James Blackwood* and his successors in the office of chairman for the time being of the committee of the *Victoria Racing Club*,

"All that piece or parcel of land in the colony of *Victoria* (describing the same), together with all rights, &c. Reserving and excepting nevertheless unto us, our heirs and successors, all such parts and so much of the said land hereby demised as may hereafter be required for making public ways, canals, railroads, sewers or drains in, over, and through the same, to be set out by the Governor for the time being of our said colony, or some person duly authorized in that respect. And also all mines of gold or silver, and of coal, with full and free liberty and power to search for, dig, and take away the same. And also the right of full and free ingress, egress, and regress into, out of, and upon the said land hereby demised for the purposes aforesaid, or any of them. To have and to hold the said land and premises hereinbefore expressed to be hereby demised unto the said *James Blackwood* and his successors in the office of chairman for the time being of the committee of the *Victoria Racing Club*, for the term of ninety-nine years from the date of these presents, yielding and paying therefor the yearly rent of one peppercorn if demanded:

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(1) For a report of the case in the Court below, see 2 Vict. Law Rep. Cases at Law, p. 87.

"Provided always, and we do hereby expressly declare, that the land and premises hereby demised shall be held by the said *James Blackwood* and his successors in the office aforesaid, and all and every person or persons in whom the legal estate in the term hereby created may become vested in trust for the *Victoria Racing Club*, for the purposes of the *Victoria Racing Club Act*, 1871.

"In testimony whereof we have caused our grant to be sealed with the seal of our said colony. Witness, &c., January, 1872."

Mr. *McIntyre*, Q.C., and Mr. *J. D. Wood*, for the Appellants, contended that the appeal of the Respondent to the general sessions against the assessment of the racecourse ought to have been dismissed. The racecourse having been demised by the Crown to the Respondent and his successors in the office of chairman of the *Victoria Racing Club* for a term of ninety-nine years, was not "land the property of Her Majesty." The Crown had divested itself of all interest and leased the land for ninety-nine years. It had no real interest, only an ultimate estate therein. Provided the conditions in the lease and Act are fulfilled, the lessee has a right to hold against the Crown, and property so held cannot be held to be the property of the Crown. Moreover, in order to exempt it from rateability it must be exclusively held for public purposes.

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That cannot be predicated of land used for the purpose of horse-racing. Even if land so used were "land used for public purposes," the fact that the *Victoria Racing Club* charges money for the admission of persons desirous of seeing the races renders the club occupiers for value, and prevents the land being deemed to be land exclusively used for public purposes. Besides, the club derives profit from selling the right of vending liquor on the course, and from allowing sheep to graze and horses to be trained on it; and its members enjoy special privileges as regards portions of the course—the grand stand, saddling-paddock, and hill. All moneys received as above and from charges for admission go to the funds of the club. They referred to the various provisions of the Act under which the club was constituted, and to *Reg.* v. *Lady Emily Ponsonby* (1); *Reg.* v. *Harrogate Commissioners* (2); *The Mersey Docks and Harbour Board* v. *Cameron* (3); *Commissioners of the Leith Harbour* v. *Inspector of the Poor* (4); *Mayor and Corporation of London* v. *Stratton and Others* (5).

The object of the colonial Legislature was to define what property should be rateable and what should be exempted. In *England* the Crown is not bound by any Act unless expressly named. In *Victoria* the Legislature expressed in words the exemption which is implied in *England*, and it is necessary that every exemption should be clearly stated: see 33 Vict. c. 360, s. 6, Land Act of 1869. As to the land being let for public purposes when let for training horses, see *Justices of Lancashire* v. *The Overseers of Cheetham* (6); *Reg.* v. *Shee* (7); *De la Beche* v. *Vestrymen of St. James* (8); *Reg.* v. *Overseers of West Derby* (9); *Hanna* v. *Seymour Road Board* (10). "Public purposes" does not mean public in any loose and general sense of the term, but national purposes.

Mr. *Thesiger*, Q.C., and Mr. *Erskine Pollock*, for the Respondent,

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(1) 3 Q. B. 14.

(2) 15 Q. B. 1012.

(3) 11 H. L. C. 443; 35 L. J. (N.S.) Duties of Magistrates, p. 24.

(4) Law Rep. 1 Sc. Ap. 17; see also *Greig* v. *The University of Edinburgh*, Ibid. p. 348.

(5) Law Rep. 7 H. L. 477.

(6) Law Rep. 3 Q. B. 14.

(7) 4 Q. B. 2.

(8) 4 E. & B. 385. 1 Jur N.S. 375 3

(9) Law Rep. 10 Q. B. 282.

(10) 2 W. W. & A'B. Sup. Court Cases at Law, 93.

(3) S C 11 Jur N S 747.

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contended that the judgment was right on two grounds: first, that the land in question was not rateable property within the meaning of the *Local Government Act*, 1874, but was exempted under sect. 253 thereof; secondly, that it was the property of the Crown and used for public purposes only. The exemptions under the local Act are greater than they are under the general law in *England*. Prior to the *Mersey Docks Case* (1) the principle, as far as can be gathered, is that where property was held by trustees for public purposes, inasmuch as there was no beneficial occupation, there was no liability to the rate. The distinction was between trustees who hold property for public purposes in the widest sense and those who hold for public purposes within some limited local boundary. The distinction was not absolutely adhered to, but this was the only principle down to the *Mersey Docks Case* (1): see judgment of *Blackburn*, J., in that case, and also *Reg.* v. *Badcock* (2). The question is not one of title, but of occupation. If the property is in the Crown, the occupier who holds otherwise than for public purposes in the widest sense is liable to be rated. And it is the occupier who is rated in respect of his property, according to his ability; it is not the property which is rateable, regardless of the occupier and his circumstances. Turning to the construction of the local Act, what had the local Legislature in their minds when they passed it? 5 & 6 Vict. c. 36 (Imperial) related to the disposition of Crown lands, including those the subject of this suit: see sect. 3, under which lands may be reserved for several specified objects of general utility or amusement. The starting of a public racecourse would distinctly come within that section. It would be for general public purposes, not merely for public recreation. Heavy expenses are incurred with regard to it, and funds must be derived, though not from the general public, yet from such members of the general public as chose to avail themselves of the advantages: see preamble to the local Act of 1871 and demise of the 21st of September, 1859, therein recited. The Crown has acted on the assumption that the public purposes included in 5 & 6 Vict. c. 36, were the same as are now in question. [Mr. *McIntyre*:—5 & 6 Vict.

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(1) 11 H. L. C. 443; 35 L. J. (N.S.), Duties of Magistrates, p. 24.

(2) 6 Q. B. 787–798.

(1) S.C. 11 Jur. N.S. 746

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c. 36, is repealed by 18 & 19 Vict. c. 55]. See the character of the demise; the trustees are simply and solely for public purposes. The policy of the Imperial Legislature and the actual legislation in the colony must be considered together; 5 & 6 Vict. c. 36, s. 23, defines waste lands; 9 & 10 Vict. c. 104, gives power to the Queen in Council to make Orders in Council, and repeals 5 & 6 Vict. c. 36, to a certain extent. For the Orders in Council see *Adamson's Victoria* Council, vol. i. p. 533. 18 & 19 Vict. c. 55, expressly retains the Orders in Council, though repealing the two Acts until the colony should deal with the question. Then came the local Land Acts—the Act of 1869 repealing those of 1862 and 1865. Under sect. 253 of the local Act of 1874, the exemptions go much farther than anything in this country. If the Crown could be liable to rating at all, it must be on account of occupation, not of title. But land in the occupation of the Crown is expressly exempted: see *The Mersey Docks and Harbour Board* v. *Cameron* (1).

Mr. *McIntyre*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal is from a judgment of the Supreme Court of *Victoria*, which affirmed the decision of a Court of General Sessions of the Peace, disallowing a rate made by the council of the borough of *Essendon and Flemington* on a racecourse vested in the Respondent as chairman of the *Victoria Racing Club*.

The description in the rate is "Trustees of Racecourse—Racecourse," and the assessment is made on a net annual value of £2500.

The racecourse is held by the Respondent under a demise from the Crown, in trust for the club, and for the purposes of the *Victoria Racing Club Act*, 1871.

The question to be decided is whether the racecourse falls within the exemption from rateability contained in the 253rd section of the *Colonial Local Government Act*, 1874. That section enacts that "all land shall be rateable property" save "land the property of Her Majesty which is unoccupied or used for public purposes, land in the occupation of the Crown or the Government of *Victoria*," and land held or used under certain specified conditions to which it is not necessary to refer.

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(1) 11 H. L. C. 443; 35 L. J. (N.S.), Duties of Magistrates, p. 24. 11 Jur. N.S. 746

The Respondent contends that this racecourse is "the property of Her Majesty used for public purposes;" the Appellants say that at the time of making the rate it was neither the Crown's property nor used for public purposes.

The history of the racecourse and of the club is found in the preamble of the *Victoria Racing Club Act*, 1871.

A grant from the Crown (21st of September, 1859) was made of certain lands (said to contain 301 acres) to Mr. *Ligar*, and four other persons, for twenty-one years, at a peppercorn rent, upon trust that it and the buildings to be erected on it should throughout the term "be set apart, maintained, and used as a public racecourse," subject to such reasonable rules and regulations for the admission of the public, and the price to be paid for such admission, as the trustees should in writing resolve on.

Power was given to the trustees to raise money to be applied in furtherance of the purposes of the grant, and to charge the admission prices with the payment of the money so raised.

The preamble further states that in 1864 the racing club was formed, and with the consent of the above trustees had "now" the control and management of the racecourse, and that the club had expended considerable sums of money in improving the course, and in erecting good and substantial buildings and fences on it, and proposed to expend further moneys to a considerable amount in erecting a new grand stand and other buildings.

Such was the state of things when the *Racing Club Act* of 1871 was passed.

It enacts (sect. 3) that the club may sue and be sued in the name of the chairman, and (sect. 6) that execution may issue on judgments against the chairman upon the property of the club, except the land vested in or demised to him under the Act.

Sect. 7 enacts that *Ligar* and the other lessees shall cease to have any interest under the grant of 1859, and that the land demised by it shall be vested in the chairman and his successors "in trust for the club," as if he and they were a corporation sole, for the term and upon the trusts mentioned in the grant.

The 8th section empowers Her Majesty to demise the same land and any contiguous land to the chairman and his successors for any term of years.

In pursuance of the powers conferred by this section, the Crown, by a grant of the 8th of January, 1872, demised the racecourse to the Respondent and his successors for the term of ninety-nine years, at a peppercorn rent, to be held by them "in trust for the *Victoria Racing Club* for the purposes of the *Victoria Racing Club Act*."

The 10th clause of the Act is as follows:—

> "The lands by this Act vested in or authorized to be demised to the chairman shall be held by such chairman and his successors in office only for the purpose of being maintained and used for a public racecourse, under and subject to the provisions of this Act, and any by-laws to be made under and by virtue hereof, and save as herein expressly provided, shall not be used, demised, or let for building purposes, or, unless with the permission in writing of the Board of Land and Works first had and obtained, for any other purpose whatsoever."

It is unnecessary to consider whether the term of twenty-one years granted by the original lease has merged in the larger term, for the 11th section declares that the land so granted shall be "vested in the chairman for the purposes mentioned in the 10th section."

Powers are given to the committee of the club to maintain the existing buildings on the land, and to erect such others as may in their opinion be expedient "for or in connection with the use of the land as a public racecourse" (sect. 12); also to make by-laws for the election of members to the club, and the expulsion of members, and for the management of the affairs of the club, and also for regulating all matters concerning the racecourse, "and the admission thereto and expulsion therefrom of members of the club and the public respectively, and the charges to be paid for such admission, and for the general management of the racecourse-races, and race meetings" (sect. 13).

It is to be observed that the Act provides for two classes of by-laws, one regulating the club, the other the racecourse.

The 24th section enables the committee to prescribe by by-laws the tolls and charges to be levied for admission to the racecourse, and the buildings thereon, and to demand and recover them from any person coming upon the land or buildings; but it contains a very material provision in favour of members of the club, viz., that "the committee may in any such by-law provide that members of the club shall be exempt, either wholly or to such extent as such by-law shall specify, from the payment of all or any of such tolls or charges."

Provision is made that by-laws shall not be in force until a month after they have been notified to the Chief Secretary of *Victoria*, within which period they may be disallowed by the Governor in Council (sect. 14), and for their publication in the *Gazette* (sect. 15). The Governor in Council may repeal by-laws (sect. 18).

Other sections provide that they shall be exhibited on the racecourse, and prescribe penalties for offences against them (sects. 18–20).

Power is given to the chairman to let from year to year, or for a less time, any portions of the racecourse or the tolls demandable under the Act (sect. 25).

Power is also given to the chairman to borrow on the credit of the rents, profits, tolls, and other revenue of the club, £15,000, and to mortgage the revenue to secure it, and to re-borrow to that amount; the money to be applied in the permanent improvement of the land for racing purposes, or in the erection and maintenance of buildings, or for rendering the land more convenient and useful for racing purposes (sects. 26, 27, 28).

Provision is made for an annual audit of the accounts of the receipts and expenditure of the club by an auditor appointed by the Board of Land and Works; and such accounts are to be open to the inspection of the public (38th and the following sections).

The 43rd section enacts that if the land shall, except with the consent of the Governor in Council, cease for twelve months to be used as a public racecourse, or be applied to any other purpose, it shall revert to Her Majesty for the benefit of the public (sect. 43).

To this provision, however, there is attached a condition (material to be considered with reference to the question to be now determined), that the Crown shall not be entitled to resume possession without previously paying to the chairman "In trust for the club" the value of all buildings then upon the land, to be determined in case of dispute under the *Lands Clauses Consolidation Act* (sect. 44).

It is to be noticed that the Act assumes that the club may possess real and personal property, other than the land derived from the Crown, and vests such property in the chairman and his successors, in trust for the club (sect. 9).

It appears from the evidence stated by the Court of Sessions that large sums have been expended by the club in erecting a grand stand, ranger's house, horse boxes, and other buildings, the grand stand alone having cost £14,000. On the other hand, large profits have been derived from the race meetings, as much as £13,887 having been received at one meeting, upon which there was a net profit of £4497. Large profits also have been made by fees for the use of the racecourse as training ground, and by the sale of the right to sell liquor, and for sheep depastured on the racecourse. The receipts, it is stated, go to the funds of the club.

It is also stated that "the members of the club have certain privileges, so far as the grand stand, saddling-paddock, and hill are concerned, and pay £5 a year."

If this racecourse, with all the above conditions, had been held under a grant from a private owner, it could not have been disputed that it would be rateable. It is exempt only, if, being Crown property, it is used for a public purpose.

In their Lordships' view, it is extremely doubtful whether it can be predicated of this land that it was, at the time and for the purpose of rating, the property of Her Majesty. It was then vested in the Respondent, and his successors, for a term of ninety-nine years, with a modified power of sub-letting. The Crown had a reversion only, and was no longer the present and immediate owner of the land. If the proposition that the property is the Crown's be correct, it might have been affirmed with equal truth had the term been 500 years instead of ninety-nine years.

By the interpretation clause of the Colonial *Local Government Act*, the words "owner of any rateable property" are declared to mean "the person for the time being entitled to receive, or who, if the same were let to a tenant at a rack rent, would be entitled to receive the rack rent thereof;" and by the 290th section, unpaid rates, in default of payment by the occupier, may be recovered from such owner. It was conceded that if the Respondent should let the land, the tenant, as occupier, would be liable to be rated; and it seems plain that if such tenant were in default, the rates might be recovered from the Respondent as, within the meaning of the Act, the owner of the land.

Undoubtedly if a grant were made by the Crown to its own nominee, as a bare trustee for exclusively public purposes, it might properly be held that the land, within the meaning of the exemption, was still the property of the Crown.

But is that the character of the Respondent's holding?

In coming to the consideration of this question, their Lordships assent to what was suggested by Mr. *Thesiger* in his able argument, that the two questions of property and public use in some degree run into each other.

It is not easy, nor is it necessary, to define generally what is meant by the words of the exemption "the property of the Crown used for public purposes," though land used for the public service, or as a public park, may be mentioned as instances which would clearly fall within them. But it may well be doubted whether a racecourse to be enjoyed by those only of the public who are able and willing to pay for admission (all others being liable to be punished as trespassers—sect. 21) can be deemed to be so used.

Their Lordships, however, do not think it necessary to decide the appeal on this point, being of opinion that in order to bring the case within the exemption the Respondent ought to shew that the land was used solely for public purposes, without any beneficial occupation by individuals; and this they are of opinion he has failed to do.

The Chief Justice of the colony took this view of the exemption in a case where the tolls of a bridge had been let for seven years to a builder, to enable him, it was said, to repay himself the cost

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of building it. The bridge having been found to be the property of the Queen, *Stawell*, C.J., said: "The only question, therefore, is whether it was used for public purposes. To be deemed so, it must be purely and solely used for such purposes. Here the public had, no doubt, a right of passage over the bridge, but only on payment of a toll; so that it was not for public purposes only, it subserved a private purpose also, and was therefore rateable": *Hanna* v. *Seymour Road Board* (1).

The Respondent's trust is twofold. He holds in trust for the club, and for the purposes of the Special Act. No doubt there is some indication in the Act that these purposes were of a public nature. The sanction of the Governor in Council required for the by-laws, and the power given to the same authority to repeal them, the audit of the accounts by an auditor appointed by Government, and the direction that the accounts shall be open to the public, tend to shew that in some sense the racecourse is what it is called, "a public racecourse;" but these are not conclusive tests, since some commercial companies of a public or *quasi* public nature have been made subject by statutes to not dissimilar conditions. But together with the trust for these purposes there is the trust for the club, and it is plain that there are many special privileges and profits to which the members of the club, as such, are entitled, differing in kind from any which the general public can enjoy. Nor were these privileges conferred without consideration. The members of the club had voluntarily expended large sums of their own money in buildings and other improvements before the land became vested in them, and proposed to spend further moneys for the same purpose. It was, therefore, not unreasonable that they should have special privileges, and an interest in the profits to be derived from the racecourse.

Thus the 24th clause enables the committee, in framing the by-laws prescribing the tolls and charges to be taken on admission, to exempt the members of the club wholly or in part from such tolls and charges; and, although the by-laws have not been produced, it was not denied that this exemption has been made. There is nothing in the terms of the trust (if no by-law was made to the contrary) to prevent the members of the club having access at all times to the racecourse and the buildings on it without payment; and they have, as stated in the case, certain privileges "so far as the grand stand, saddling-paddock, and hill are concerned."

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(1) 2 W. W. & A'B. 93.

It is true the members pay an annual sum of £5; but this is obviously the subscription to the club, and in respect of it they, as members of the club, obtain privileges of an exclusive character, greatly coveted and valued by those engaged in racing pursuits, which constitute a beneficial enjoyment of the land beyond that of the general public.

Further, the club, as a club, has a pecuniary interest in the rents and profits of the racecourse.

The Act contains no express trust for the appropriation of these profits, but a trust may be implied from the 24th section that they should be applied to the maintenance of the racecourse, and the use of it for racing purposes. No provision is made for the appropriation of the surplus profits after these purposes are fulfilled, and their Lordships see no reason to suppose that they might not be properly applied to repay the moneys which the club may have expended for the buildings placed upon the land. This would obviously be a benefit to its members derived from the profits of the land.

Not only so, but by the express provision of the 44th section, on the contingency of the land reverting to the Crown in case it shall cease to be used as a racecourse, the club would receive a large pecuniary benefit in being paid the value of all the buildings on the land. It is evident that the cost of these buildings might have been defrayed entirely, or in great part, out of the profits derived from the racecourse. In addition to any moneys which the club, out of its own funds, may have spent on buildings, either before or after the Act, the £15,000 which the Respondent was empowered to borrow on the credit of the tolls and rents, may have been expended for the same purpose. All buildings thus placed on the land were to be maintained out of the profits of the racecourse, and the money borrowed to erect them might have been wholly repaid from the same source; yet in the event of the cesser of the term, the Respondent would receive in money the full value of all those buildings.

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The only trust declared of this money is "for the club." Its members, therefore, would be absolutely entitled to it, subject to no obligation to apply it to any public purpose whatever.

The Judges below do not deny that a beneficial interest may accrue to the club in this respect; but say that as a forfeiture and consequent resumption are not to be presumed, "they are not to suppose that the value of the buildings will be received by the club." Such a contingency, however, might very possibly happen. Supposing the profits to be insufficient to maintain the racecourse, it is not likely the club would keep it open at a loss, and resumption might then take place. Besides, these provisions, coupled with those already commented upon, afford tests for determining whether or not the land was vested in the Respondent as a bare trustee, for a public purpose only.

The Respondent's counsel sought to support their contention that the use of land as a racecourse was a public purpose by referring to the 6th clause of the *Victoria Land Act*, 1869, which enables the Governor to reserve from sale Crown lands which in his opinion are required "for any public purpose whatsoever," or "for the recreation, convenience, or amusement of the people;" but a comparison of this clause with the exemption clause of the *Local Government Act* does not assist the Respondent. The words "for the recreation, &c. of the people" are not found in this exemption clause, and the introduction of them into the 6th clause of the *Land Act* indicates that previous words "for any public purpose" may have been used in a sense which would not include objects of this nature.

It is unnecessary to refer at length to the English decisions. In this country the exemption of Crown property rests on the omission in the Poor Law Acts of any words to bind the Crown. In *Victoria* the exemption is defined and limited by express enactment. So the class of cases in *England* which declared that land used for public purposes, and from which the occupiers derived no individual profit, was exempt from rateability, derived their authority simply from decisions of the Courts. These decisions were swept away by the judgment of the House of Lords in the *Mersey Docks* v. *Cameron* (1), which determined in effect that, except in

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(1) 11 H. L. C. 443. 11 Jur. N.S. 748

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the case of the Crown, a liability to be rated attached upon every occupation from which benefit is derived, although the occupation was for purposes which might be deemed to be of a public nature. Even when the above-mentioned class of cases was considered to declare the law, Lord *Campbell*, in *Reg.* v. *Harrogate* (1), said, "You have to shew that all the purposes to which the money was applied are public."

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court and the decision of the Court of General Sessions be reversed; and the Court of Sessions having reserved the question of the amount of the rate until the question of the liability of the Respondent to be rated had been decided by the Supreme Court, they will further advise Her Majesty to direct that the case be remitted to the Court of General Sessions, with a declaration that the Respondent is liable to be rated for the racecourse, for the purpose of that Court determining the amount of the assessment. Their Lordships think that each party should pay his own costs in the Supreme Court; and Her Majesty will therefore be further advised to direct that the costs (if any) which may have been paid by the Appellants to the Respondent, under the rule of the Supreme Court of the 4th of July, 1876, be repaid by the Respondent to the Appellants.

The Respondent must also pay to the Appellants the costs of the appeal to Her Majesty.

Solicitor for the Appellants: *T. Randall.*
Solicitors for the Respondent: *Tamplin, Tayler, & Joseph.*

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(1) 2 E. & B. 184.

[PRIVY COUNCIL.]

HOARE AND OTHERS . . . . APPELLANTS;

AND

THE ORIENTAL BANK CORPORATION . RESPONDENT.

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May 5, 9.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Bankruptcy—Proof against Partnership Estate in respect of Joint Debts.

H. and *C.* having with *W. S.* and two other persons for themselves and each of them, and any two, three, or four of them, jointly and severally bound themselves to the Respondent in a large sum of money to secure advances to be made to *W. S.*; *H.* and *C.*, who carried on business in partnership, were adjudicated insolvents, both in respect of their separate estates and their joint estate, upon their own application, under the local Insolvent Act.

C. and *H.* each entered the debt (which was unconnected with their partnership business) to the Respondent under the bond in the schedule of his separate estate. The Respondent was subsequently admitted to prove the same against the joint estate:—

Held, that, under the bankruptcy law of *England* as it existed in 1841, which had been introduced into the colony concurrently with the Insolvent Act, the Respondent was properly admitted to prove against the joint estate *pari passu* with the partnership creditors.

No distinction can be drawn between joint debts so as to exclude from proof against the joint estate of any joint debt which is not shewn to have been incurred in the strict sense of the term as a partnership transaction, and as arising out of partnership business, either under the said bankruptcy law or under sects. 4 or 17 of the Insolvent Act.

APPEAL from a judgment of the Supreme Court of *New South Wales* (December 22, 1875), dismissing with costs an appeal of the Appellants from an order of the Chief Commissioner of Insolvent Estates in *Sydney* (October 27, 1875), allowing and admitting a proof of the Respondents against the partnership estate of *Walter Marshall Church* and *Robert Hills* for the sum of £20,668. 0s. 3*d.*

On the 3rd of July, 1872, *Walter Scott, W. Price*, the above-named *Hills* and *Church* (who it appeared carried on business in partnership as "*Church & Hills*"), and *E. T. Beilby*, executed a bond to the Respondents, the obligatory part of which is given in their Lordships' judgment.

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

On the 8th of June, 1875, the Respondents issued a writ in an action upon the bond against *Hills, Church*, and *Beilby*, for the above-mentioned sum. On the 23rd of June, 1875, an order was made by the Chief Commissioner of Insolvent Estates at *Sydney* for the sequestration of the partnership estate of *Church & Hills*, and separate orders were also made for the sequestration of their separate estates. *Beilby* and *Scott* also traded together in copartnership under the firm or company of "*Beilby & Scott*," and orders were made for the sequestration of their partnership estate and also of their separate estates.

On the 31st of August, 1875, the Respondents made a claim in respect of the bond upon the partnership estate of *Church & Hills*, for that the insolvents, jointly and severally with other persons, entered into the said bond. It was not alleged that the debt was otherwise a partnership debt.

The Appellants were partnership creditors of *Church & Hills*, who had duly proved their debt against the partnership estate of the firm.

On the 27th of October, 1875, the Chief Commissioner made an order admitting and allowing the proof of the Respondent against the partnership estate of *Church & Hills*, and an appeal therefrom to the Supreme Court was dismissed with costs (*Martin*, C.J., dissenting).

Mr. *Mackeson*, Q.C., and Mr. *Solomon* (Mr. *Watkin Williams*, Q.C., with them), for the Appellants, contended that this order should be reversed. The bond of the Respondents was not a joint debt of the *firm* of *Church & Hills;* nor was it a partnership debt. The five obligors of the bond were engaged in a joint adventure in respect of some mine, and the debt represented by the bond was a separate one, apart from the partnership debts of the firm. It is a settled rule that the joint creditors shall be paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. In every case where partnership assets have in bankruptcy been held liable for the joint debts of the partners, such debts have been incurred by them as partners or on the partnership account. Where persons are liable as joint contractors merely, without reference to any partnership dealing or obligation, they do not, by means of such liability so incurred, create a primary charge in the event of bankruptcy on their partnership assets. In the Bankruptcy Court the partnership creditors have the prior claim on the partnership assets. The co-contract debts of partners, apart from the partnership, must be treated as separate debts.

The *Insolvency Act*, 5 Vict. No. 15, is the only Colonial Act which modifies the English statutes: see sects. 3, 4, and 19. Joint contractors should petition under sect. 3; only partners can come in under sect. 4. In *Lindley* on Partnership, bk. iv., c. 2, s. 3 [2nd Ed. p. 1145] and [3rd Ed. p. 1201], it is said: "In administering the estate of a bankrupt firm, or of some or one only of its members, it is necessary to distinguish accurately, first, joint from separate estate; and secondly, joint from separate debts; for the leading principle of administration is, if possible, to pay the debts of the firm (joint debts) out of the assets of the firm (joint estate), and the private debts of each partner (separate debts), out of his own private property (separate estate); in other words, to make each estate pay its own creditors." This rule was laid down by Lord *Cowper* in 1715, in *Ex parte Crowder* (1); by Lord *King* in 1728, in *Ex parte Cook* (2); by Lord *Talbot* in *Ex parte Rowlandson* (3). The rule was departed from by Lord *Thurlow*, who allowed joint and separate creditors to be paid *pari passu* out of joint and separate estate: *Ex parte Cobham* (4); *Ex parte Hodgson* (5). Lord *Loughborough*, in an order of Court (6), laid down the rule

(1) 2 Vern. 706.

(2) 2 P. Wms. 500.

(3) 3 P. Wms. 407.

(4) 1 Bro. C. C. 576.

(5) 2 Bro. C. C. 5; and see also *Ex parte Page*, Ibid. 119.

(6) 4 Bro. C. C. 547.

in nearly the same words as Lord *Cowper* in 1715; and as Lord *Rosslyn* he adhered thereto in *Ex parte Elton* (1). In later times the rule has been laid down by Lord Justice *Turner* in *Lodge* v. *Prichard* (2). Moreover, the cases under 6 Geo. 4, c. 16, s. 62, have been held only to refer to partners and not to apply to co-contractors. They referred to *Ex parte Benson* (3); *Ex parte Bauerman* (4). Sects. 100, 102, 103, 104 of *Bankruptcy Act* of 1869 (32 & 33 Vict. c. 71), only refer to partners. They referred to *Ex parte Honey* (5); *Ex parte Stone* (6); *Lindley* on Partnership [2nd Ed.] p. 691, bk. iii., c. v., s. 4; *Ex parte Wilson* (7); *Ex parte Wylie* (8); *Ex parte Nolte* (9). Separate property may belong jointly to partners and yet not be partnership estate: *Randall* v. *Randall* (10); *Brown* v. *Oakshot* (11); *Bone* v. *Pollard* (12). With regard to the inconvenience which it is said in one of the judgments appealed against would result from the further division of assets, and which would be required if co-contract debts were distinguished from partnership debts: see *Ex parte Marlin* (13); *Ex parte Parker* (14); *Ex parte Mason* (15).

Mr. *Benjamin*, Q.C., and Mr. *R. E. Webster*, for the Respondents, contended that the judgment appealed from ought to be affirmed. By the terms of the bond the Respondents were entitled to proceed against the four sureties severally, or any two of them jointly, and were therefore entitled to prove against the joint estate of *Church & Hills* as partners in liquidation. Moreover, the proceedings taken against *Hills, Church,* and *Beilby* did not prevent or estop the Respondents from proceeding against the joint estate of *Hills & Church,* as the remedies of the Respondents were cumulative. The only way for a firm to bind itself by bond is for each partner to bind himself by his own seal, and therefore there was no other way of binding the firm and its partnership estate except the way adopted in this case. There is no such thing, of course, as a bond or deed by a firm, for there is no such thing by English law as a firm: see *Lindley* on Partnership, bk. i. c. 7. Whether it was intended to create a partnership debt, or, as the other side say, a joint or co-contract debt distinguishable therefrom, the mode of creating it would be identical in both cases, and the character of the obligation in winding up the firm is identical in both cases. There are three classes of debts in winding up a partnership—joint, separate, and thirdly, joint and separate: the other side is unable to produce a fourth: see *Lindley* on Partnership, vol. ii. p. 1209 [3rd Ed.]. The contention of the Appellants is to the effect that you must sever the joint debt, and make it a several debt of each, contrary to the terms and meaning of the contract: see *Collyer* on Partnership, p. 613 [Ed. 1840], Of Joint and Separate Debts, citing *Ex parte Williams* (1). This is a guarantee by a firm—a joint debt of two individuals; if one of them had signed the bond, though in the name of the firm, he would have been separately liable. It has never been heard of before this case, that a man holding a joint obligation by all the members of the firm cannot prove a partnership debt. The other side have cited numerous cases to shew that joint and partnership debts are interchangeable in their meaning; and then seek to introduce an exception that joint debts not contemplated by the original partnership agreement are not partnership debts. There is no authority for such a distinction, which is unknown to the law of partnership: see *Ex parte Bond & Hill* (2). This distinction was once suggested to *Knight Bruce*, L.J., who repudiated it, saying that it was ingenious, but that he had never heard of it. The cases cited on the other side are strongly against it: see especially *Ex parte Rowlandson* (3); *Ex parte Crosfield* (4); *Ex parte Buckingham* (5); *Ex parte Nolte* (6). The other side also referred to *Ex parte Wilson* (7); but see *Ex parte Field* (8), *Bank of England's Case* (9).

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(1) 3 Ves. 240.
1/ (2) ~~2~~ De G. J. & S. 613.
(3) 2 M. D. & De G. 750.
(4) 3 Deac. 485.
(5) Law Rep. 7 Ch. 178.
(6) Law Rep. 8 Ch. 914.
(7) 3 M. D. & De G. 57.
(8) 2 Rose, 393.
(9) 2 Glyn & J. 295.
(10) 7 Sim. 271.
(11) 24 Beav. 254.
(12) Ibid. 283.
(13) 2 Bro. C. C. 15.
(14) *Cooke*'s Bankrupt Laws, 249.
(15) 1 Rose, 427.

(1) Buck. 13.
(2) 1 Atk. 98.
(3) 3 P. Wms. 407.
(4) 1 Deac. 405.
(5) 1 M. D. & De G. 235.
(6) 2 Glyn & J. 295.
(7) 3 M. D. & De G. 57.
(8) Ibid. p. 95.
(9) 3 De G. F. & J. 645.

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Ex parte Honey (1) is no authority for saying that when you have a joint bond of bankrupts you cannot prove against their joint estate.

Mr. *Mackeson*, Q.C., replied.

The judgment of their Lordships was delivered by

1877
May 9.

SIR JAMES W. COLVILE :—

The question raised by this appeal is whether the Respondent, the *Oriental Bank Corporation*, was properly admitted to prove a debt of £20,668 against the joint partnership estate of *Walter Marshall Church* and *Robert Hills.* The debt arose under the bond of the 31st of July, 1872, the obligatory part of which is in these words: "Know all men by these presents, that we *Walter Scott*, gentleman, *William Price*, *Robert Hills*, *Walter Marshall Church*, and *Edwin Thomas Beilby*, gentlemen, all of *Sydney*, in the colony of *New South Wales*, are jointly and severally held and firmly bound unto the *Oriental Bank Corporation* (being a banking company duly incorporated by royal charter) in the sum of forty thousand pounds of lawful money of *Great Britain*, to be paid to the said corporation, or to the manager or other officer of the said corporation, &c. ;" then it goes on, and it is upon this latter part of the clause that the question arises, "for which payment to be well and truly made we bind ourselves and each of us, and any two, three, or four of us jointly, severally, and respectively, firmly by these presents." The instrument then, after reciting that *Walter Scott* was desirous of obtaining certain advances from the *Oriental Bank*, and that it had been agreed that the debts thence to arise should be secured by the written bond of the said *Walter Scott* and of the four other persons as his sureties, sets forth the condition, which is, in effect, that if any of them repay the advances to be made to *Scott*, the bond should become null and void ; and this is followed by a proviso in these words : "Provided nevertheless, that so far as respects the liability of the said sureties under the above written bond, the same shall not extend to more than the sum of twenty thousand pounds." The bond, therefore, upon the face of it was a mere surety bond in order to secure to the bank the advances to be made to *Walter Scott*. Mr. *Mackeson*, indeed, in opening the case, gave us to understand that this was not the true nature of the transaction, but that the five obligors of the bond were engaged in a joint adventure in respect of some mine, and that the object of the bond was to obtain credit and advances from the bank for the purpose of carrying out that adventure. It seems, however, to their Lordships that they ought to treat the bond as it has been treated in the Courts below, and as upon its face it appears to be, as a mere ordinary surety bond, by which the four sureties became responsible in a certain way in order to secure advances to be made to *Walter Scott*. Nor is it material to consider whether the other view of the case could or could not be supported, inasmuch as Mr. *Mackeson* concedes that with respect to the points which he has argued it makes no difference which view of the transaction is taken, inasmuch as upon either the obligation contracted was unconnected with the business of wine merchants which was carried on by *Hills* and *Church* in partnership together. After the execution of the bond the bank made large advances under it; a considerable debt was admittedly incurred; and on the 8th of June, 1875, the bank brought an action against *Church, Hills*, and *Beilby*, three of the sureties, jointly. Nothing, however, as has been fairly admitted by Mr. *Mackeson*, arises upon that action, which was afterwards abandoned. He does not contend that it constituted an election on the part of the bank by which they were bound with respect to the subsequent question of proof. On the 23rd of June, 1875, the insolvency of *Hills* and *Church* took place. The adjudication of insolvency against them, both in respect of their separate estates and their joint estate, was issued under the insolvency statute of the colony and upon their own application. It may be necessary hereafter to refer to the particular provisions of the statute, but in the meantime their Lordships assume that the adjudications were properly made against the insolvents jointly as partners, and also against them in their separate capacities and in respect of their separate estates.

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(1) Law Rep. 7 Ch. 178.

At the time of their insolvency the insolvents filed their schedules; and in the schedule of his separate estate each has entered this debt to the bank as a debt of £20,000. On the 10th of September, 1875, an advertisement was issued by the Chief Commissioner of Insolvency calling upon persons to come in and prove their debts against the joint estate, and upon that notice the bank came in to prove, and on the 27th of October, 1875, was admitted to prove against the joint estate as due to them on the bond a debt of £20,668. 0*s*. 3*d*. The propriety of that proof was afterwards contested in the Supreme Court, where it was affirmed by two of the Judges, the Chief Justice dissenting from that conclusion.

The sole objection that has been taken before us is that the bank was not properly admitted to prove *pari passu* with the joint creditors of the insolvents, who were creditors in respect of liabilities incurred in the strict partnership business. It has been argued, first, that such a proof would have been improper under the bankruptcy law of *England* as it existed in 1841, which it was admitted has been introduced into the colony concurrently with the Insolvent Act; and, further, that it is also repugnant to the particular provisions of the statute. Their Lordships will dispose of the first of these objections in the first instance.

The question, as has already been said, arises upon that portion of the bond which gives to the obligee, the Respondent bank, the power of suing any two of the obligors, their heirs, executors, and administrators, and binds them, or any two of them, jointly and severally.

According to the rule indicated by Lord Justice *James* in *Ex parte Honey* (1), such an obligation is to be treated as if it arose upon a separate bond by which the two partners *Hills* and *Church* were so bound jointly and severally. It follows that on the insolvency of the two obligors, unless the particular objection taken by Mr. *Mackeson* can be supported, the bank (being the obligee) would have a right to elect whether it should prove against the separate estates of the partners, or whether it should prove against their joint partnership estate; but it could not prove against both the joint and the separate estates. At first sight it would seem that the true test whether the creditor can prove against the joint estate is whether before the insolvency he could have sued the two debtors jointly upon the bond, and upon recovering judgment

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(1) Law Rep. 7 Ch. 178.

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have taken out execution against the partnership assets. That this could have been done in the present case seems unquestionable. It may be remarked, moreover, that if such a judgment had been recovered, and the insolvency had taken place afterwards, but before execution, the rights of the judgment creditors would have been affected, because they would have lost their right to elect between the joint and the separate estates, and would have been obliged, the joint and separate debt having merged in the joint judgment debt, to prove in the first instance against the joint estate. Mr. *Mackeson*, however, insists that upon the authorities it must be taken that the rule which has prevailed in bankruptcy with slight exceptions ever since the time of Lord *Cowper*, must be taken with this qualification, namely, that creditors who cannot shew that their joint debt has been incurred, in the strict sense of the term, as a partnership transaction, and as arising out of the partnership business, cannot be admitted *pari passu* with the creditors, properly so called, of the partnership.

It appears to their Lordships that if this distinction really obtains, it is for the Appellants to shew a case in which upon argument its existence has been affirmed by decision. It is not enough to accumulate authorities in which learned Judges, dealing with cases where there were probably only partnership debts, speak generally of a joint estate as a partnership estate, or of joint creditors as partnership creditors. Their Lordships can find no authority which really establishes the supposed distinction, and on the other hand they think that there is authority the other way.

In the early case before Lord *Hardwicke*, reported in the first volume of *Atkins*, page 98, the case of *Ex parte Bond and Hill*, all that appears is that the creditor was a creditor upon a joint and several bond; and the question was raised whether he was entitled to prove under both petitions at the same time, and the Lord Chancellor said: "I had some doubt the last day of petitions, but upon searching I find it has been determined where there is a creditor on bond against two persons jointly and severally, and both become bankrupt, he is entitled to receive a satisfaction out of the joint estate, and if the joint estate falls short, he is for the residue entitled to a satisfaction out of the separate estate, but then the Court will put him to his election, and if he elects to come under the joint estate he will, with respect to a satisfaction for the residue, be postponed to all the creditors of the separate estate." No distinction is there made as to the nature of the transaction out of which the obligation arose. The rule is stated broadly, that wherever the obligation is joint and several the creditor is put to his election.

It seems to their Lordships, however, that in the case of *Ex parte Field* (1) the question has been more directly decided. That was not exactly a case of competition between the joint and separate estates of the insolvent partners, but arose upon the rule that a joint creditor cannot prove against one of his debtors if another be solvent. The decision was that the rule was not confined to cases of partnership, but applied generally to co-contractors. In the argument in support of the petition it was stated that the rule which excludes a proof against the separate estate of one debtor where there is a solvent partner was only adopted as a consequence of and a corollary from the rule which excluded such a proof where there were joint assets, and therefore the principle upon which the two rules rest is identical. This case was deliberately decided by a Judge of very great experience in bankruptcy, the late Lord Justice *Knight Bruce.* When it was first argued before him he directed the earlier authorities on the point to be looked into; it was afterwards re-argued; and in giving judgment the learned Judge said: "This is a case of a joint debt due from the bankrupt and two other persons, one of whom is solvent and living in *England,* and the question is whether the joint debt is to be proved under the fiat against one of three debtors in competition with his separate creditors. I conceive that a long course of practice founded on decisions of great authority has settled the point against the right of proof before the *Bankruptcy Court Act* passed. Such was the law I apprehend clearly when the Act passed, and I am not aware that either that or any other statute has varied the law in this respect, or any subsequent decision of the Lord Chancellor or the House of Lords at variance with the rule has taken place. I must, therefore, act upon the rule, and upon that ground dismiss the petition. It has been ingeniously argued that the rule does not apply where the joint debtors were not all traders subject to the bankruptcy laws, or where there was no partnership between them in the common, which is a restricted sense of that term, or where from the nature of the connection between the joint debtors there would be no joint property incident to the connection. I am not aware of any such limitation of the rule, and, therefore, I do not pronounce any opinion whether if the rule were so limited, that would help the Petitioner's case." It seems to their Lordships that if that case is in conflict with the earlier cases of *Ex parte Crosfield* (1) and *Ex parte Buckingham* (2), it must be taken to have overruled them. It is cited in the last edition in a note of Mr. Justice *Lindley's* work upon Partnership, where having said broadly "Except in the cases hereafter mentioned the joint creditors of partners are not entitled to payment out of their separate estates in competition with their separate creditors. This rule is now so well established that it is useless to refer particularly to the cases illustrating it, and it is proposed, therefore, to notice at once the exceptions to the rule;" in a note upon that passage he says, "As to co-debtors not partners, see *Ex parte Field* (3); *Ex parte Buckingham* (2); *Ex parte Crosfield* (1)."

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(1) 3 M. D. & De G. 95.

Their Lordships, without going at length into the numerous other cases which have been cited, are upon the weight of authority, as well as upon principle, of opinion that the Respondent bank was properly admitted to make proof of its debt as against the joint estate of *Hills* and *Church* according to the English law of bankruptcy as it existed in 1841.

Their Lordships have now to consider the argument founded upon particular sections of the local Insolvent Act. Nothing in their opinion can arise on the 17th section, because that relates to adjudications of insolvency which issue *in invitos* on the application of the creditors of the insolvents; and it is perfectly clear that in this case the insolvency was not of that kind, but that the adjudication took place upon the petition of the parties themselves. There are, then, only two sections which bear upon the point. The first of these is the 3rd section, which enacts that "it shall be lawful for any Judge of the Supreme Court of the said colony, upon the petition in writing of any person setting forth that he is insolvent and desirous of surrendering his estate for the benefit of his creditors, either to direct such person to appear before him to be examined touching his said insolvency, or to receive such other proof thereof by affidavits of the said insolvent and others as to the said Judge may seem fit, or to direct such petitioner to appear before any such Commissioner as aforesaid, and to direct such Commissioner to examine the petitioner," and so on; "and it shall and may be lawful for any Judge of the said Supreme Court, on considering the report of any such Commissioner, or upon proof of the matters aforesaid to his satisfaction, to accept the surrender of such estate, and by order under his hand to place the same under sequestration in the hands of the Chief Commissioner in and for that part of the colony in which such insolvent shall reside." The adjudications of insolvency which took place as to the separate estates of the two partners upon their separate petitions necessarily took place under that section. It is suggested, however, that the adjudications against the joint estate issued under the 4th section, which is to this effect: "It shall in like manner be lawful for any Judge of the said Supreme Court, upon the like petition of any person legally vested with the administration of the estate of any person deceased, or with the estate of any other person situate in the said colony in trust for creditors," that portion of the section does not apply to the present case, "or upon the like petition stating the insolvency of the estate of any company trading or having any estate or effects within the said colony made by the greater number of the partners of such company who at the time of presenting the petition are within the said colony, to examine the petitioner or petitioners," following very much the provisions of the preceding section, and ending by empowering the Judge "upon proof of the matters aforesaid to his satisfaction to accept the surrender of any such estate, and to place the same under sequestration in manner aforesaid, and after the order for any such sequestration is made the like proceedings shall and may be had and take place concerning such estate and the person in whom

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(1) 1 Deac. 405.
(2) 1 M. D. & De G. 235.
(3) 3 M. D. & De G. 95.

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the administration thereof is legally vested and the partner or partners of such companies as are herein provided concerning other estates and other insolvents." Their Lordships entertain some doubt whether the application with respect to the joint estate of *Hills* and *Church* and the proceedings thereon, which are not forthcoming, really took place under that section; whether the provision as to a company does not apply to something in the nature of a joint stock company rather than to an ordinary trading partnership between two partners, and whether in fact the adjudications as to the joint estate did not really issue under the 3rd section. There is no express interpretation clause in this Act; but their Lordships are under the impression that there is a general interpretation Act in the colony which may authorize the word "person" in the 3rd section to be read as "persons." But, however that may be, their Lordships are of opinion that even if the adjudication as to the joint estate took place under the 4th section, that would make no difference in the case; or help to establish the distinction for the existence of which the Appellants have contended. They think that all that is provided at the end of the section is that the administration is to go on and take place in the same manner as it would take place concerning other estates and other insolvents.

Their Lordships, therefore, on the whole case, are of opinion that no ground has been made for disturbing the decision of the majority of the Supreme Court in respect of this proof, and they must humbly advise Her Majesty to affirm that decision and to dismiss this appeal with costs.

Solicitors for the Appellants: *Parker & Clarke.*

Solicitors for the Respondents: *Murray, Hutchins, & Co.*

[PRIVY COUNCIL.]

J. C.*
1877
June 29.

C. B. BENECKE AND OTHERS . . . . . DEFENDANTS;

AND

JAMES WHITTALL AND ANOTHER, TRUSTEES OF THE ESTATE OF AUGUSTINE HEARD & CO. . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong Bankruptcy Ordinance, 1864, *Arts.* 163, 165, 167, 168, 169—*Fraudulent Preference—Rights of Trustees under Art.* 165.

In a suit by trustees appointed under a deed executed by certain bankrupts under the 165th Article of the *Bankruptcy Ordinance*, 1864, of *Hong Kong*, to set aside certain conveyances of real property made by the bankrupts to the Appellants, on the ground that the same were given by way of fraudulent preference:—

Held, that the suit could not be maintained. Articles 168 and 169 must be read as supplementary to Article 167, and all apply only to deeds which come within the provisions of Article 163. A deed executed under Article 165 must be registered, or it will be inadmissible in evidence, but not coming within the terms of Article 167 it does not give the trustees appointed thereunder all the rights of action which would have accrued to assignees in bankruptcy.

Pearson v. *Pearson* (1) approved.

APPEAL from a decree of the Supreme Court of *Hong Kong* (Feb. 16, 1876).

The suit was instituted by the Respondents, as trustees under a deed of assignment made between the members of the firm of *Augustine Heard & Co.* and their creditors, dated the 19th of April, 1875, under the provisions of the *Hong Kong Bankruptcy Ordinance*, 1864; and the object of the suit was to have certain mortgages, eight in number, given to the Appellants by the firm of *Augustine Heard & Co.*, set aside for the benefit of the creditors of the firm entitled to the benefit of the trust deed.

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep. 1 Ex. 310. 12 Jur. N.S. 589

Considerable evidence was gone into to prove that the deed had been assented to by a three-fourth's majority, so as to be binding as a deed under Article 163 of the *Hong Kong Bankruptcy Ordinance*, 1864; but it was finally admitted that proof of the requisite assent could not be given.

The Respondents alleged that the several deeds of mortgage were fraudulent preferences by *Augustine Heard & Co.* against the provisions of the Statutes of *Elizabeth*, and against the provisions of the *Hong Kong Bankruptcy Ordinance*, 1864.

The Court decided, amongst other things, that the trust deed of the 19th of April, 1875, was not valid as a deed under Article 163 of the *Hong Kong Bankruptcy Ordinance*, 1864 (corresponding with sect. 192 of the English *Bankruptcy Act*, 1861), but that under sects. 165 and 167 of the Ordinance (corresponding to sects. 194 and 197 respectively of the *Bankruptcy Act*, 1861), the Respondents were, by virtue of the said deed, in the same position as assignees in bankruptcy, and that the eight impeached deeds were void as fraudulent preferences.

By the decree, dated the 16th of February, 1876, of the Supreme Court, it was ordered that the eight deeds should be set aside and declared fraudulent and void, and delivered up to be cancelled, and that the Appellants should deliver up to the Respondents all the title deeds of the lands, hereditaments, and premises comprised therein.

Mr. *Cohen*, Q.C., and Mr. *W. F. Robinson*, Q.C. (Mr. *Rigby* with them), for the Appellants, contended that the deed of the 19th April, 1875, did not place the Respondents in the position of assignees in bankruptcy, and gave them no title enabling them to impeach the mortgages. See *Pearson* v. *Pearson* (1), which is a case exactly in point, under sects. 194 and 197 of the *Bankruptcy Act* of 1861 (corresponding to Articles 165 and 167 of the local Ordinance). And this deed not having been assented to by the requisite number of creditors does not fall within the provisions of Article 163 of the Ordinance. It does not fulfil any of the conditions expressed therein. It has no other effect than to transfer to the Respondents property which was actually vested in

(1) Law Rep. 1 Ex. 310. 12 Jur NS 589

Heard & Co. at the time of its execution; and does not in any way entitle them to recover property which had previously vested in the debtors, but which had by the debtors been conveyed to third parties.

All the cases decided under the *Bankruptcy Act* of 1861 are to the effect that sect. 197 (*i.e.*, Article 167 of the Ordinance) does not enact that the peculiar laws of bankruptcy shall apply to deeds registered under Article 165, but only to those which are registered under Article 163. The distinction between those two articles of the local Ordinance is, that Article 165 relates to any kind of deed whatsoever, while Article 163 only comprises those deeds which on the face of them provide for the conveyance of property from the debtor to his creditors, and, further, it is imperative that such deeds should be registered. Further, the cases in the Exchequer Chamber have decided that sects. 198 and 199 of the Bankruptcy Act of 1869 (*i. e.*, Articles 168 and 169 of the Ordinance), which are merely supplementary to sect. 197, do not apply to deeds which are not valid under sect. 192. They referred to *Ex parte Morgan* (1). *Ex parte Spyers, In re Josephs* (2); *Symons* v. *George* (3); *Ex parte Atkinson* (4); *Pearson* v. *Pearson* (5); *Ex parte Smith* (6); *Johnson* v. *Ossenton* (7). The last case on the subject in point of date was *Ex parte Atkinson* in 1870; the Act of 1861 having been repealed in 1869.

Mr. *De Gex*, Q.C., and Mr. *C. Bowen*, for the Respondents, in reference to this preliminary point raised on the other side, admitted that Articles 168 and 169 of the local Ordinance could not apply to deeds under the provisions of Article 165. Moreover, the evidence shews that it was assented to by the requisite number of creditors. [Mr. *Cohen*:—That was given up by the Respondents' counsel, who admitted that the bill-holding creditors could not be ascertained.] The provisions of Article 167 apply to deeds under Article 165 as well as to those under Article 163. The deed of the 19th of April, 1875, complied with the provisions of Article 163 in all particulars except as regards the number of assents required by sub-s. 2. There is only one thing ordained to be done under Article 163, and that is registration, which is an imperative condition. The other things mentioned in the sub-section may or may not be done; but the article provides that the deed shall be binding on creditors if the conditions have been observed. So Article 166 refers to registration under Article 165; and so also Article 167, for the expression therein, "who have assented thereto, or are bound thereby," cannot refer to Article 163, for *all* creditors are bound by a deed under that article. The deed of April, 1875, and the provisions of Article 167 relative thereto, were binding and effectual against the Appellants. The intention of that article was to arm the trustees, even where the assenting creditors were in a minority, or when there were even none at all, with powers of assignees in bankruptcy, with power to any dissenting creditor to upset the whole arrangement by making the debtor bankrupt. Moreover, this deed, as a fraudulent transaction, may be impeached by the Respondents independently of statute, even if Article 167 is held not to apply to it.

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(1) 1 De G. J. & S. 288; 32 L. J. (N.S.) (Bankcy.) 15. 9 Jur. N.S. 559

(2) 1 De G. J. & S. 318; 32 L. J. (N.S.) (Bankcy.) 62 9 Jur. N.S. 948

(3) 33 L. J. (N.S.) (Ex.) 231; confirmed in 34 L. J. (Ex. Ch.) 187. 10 Jur. N.S. 637, 11 Jur. N.S. 713.

(4) Law Rep. 9 Eq. 736.

(5) Law Rep. 1 Ex. 310. 12 Jur. N.S. 55

(6) De G. J. & S. 218.

(7) 38 L. J. (N.S.) (Ex.) 76.

Mr. *Cohen*, Q.C., replied.

THEIR LORDSHIPS, at the close of the argument upon the preliminary point, intimated their opinion that the deed being under Article 165, and not under Article 163, Article 167 did not apply to it so as to give to the trustees the right of assignees in bankruptcy. Therefore there was no power to the creditors to impeach the deed on the ground of fraudulent preference, and the argument whether on the facts disclosed by the evidence, the deed constituted a fraud so much exceeding that of a mere fraudulent preference as to be liable to be set aside on that ground, was then proceeded with. At its close the judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is an action brought by trustees appointed under the provisions of a deed of the 19th of April, 1865, executed by the firm of *Augustine Heard & Co.*, carrying on business in *Hong Kong*, as well as in other places. The Plaintiffs sue for the purpose of setting aside certain conveyances of real property to the Defendants, merchants in *London*, on the ground that they were given by way of fraudulent preference.

The first question raised by the Defendants, Appellants, is whether the Plaintiffs have the right to maintain a suit on this ground; and inasmuch as this question, if disposed of in favour of the Appellants, decides the case, their Lordships have thought it desirable to hear the argument upon it in the first instance.

This question depends upon the construction of an Ordinance of *Hong Kong* in 1864 on the subject of bankruptcy, which was passed three years after the well known *Bankruptcy Act* in this country of 1861, and in a great measure, indeed in a great number of clauses almost *totidem verbis*, follows that enactment.

The material sections of that Ordinance for the present purpose are, first, sect. 163. This comes under the head of "Trust deeds for the benefit of creditors," and enacts as follows: "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, as trustees for the rest, or a trustee on their behalf, relating to the debts or the liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided the following conditions be observed." Then come several conditions. The first of them is that the deed shall be a conveyance of the estate of the debtor, except a small portion; the next, that a majority in number representing three-fourths in value of the creditors shall in writing assent to or approve of such deed. Then come provisions relating to the execution of the trust deed. Then follows a further provision in these terms: "Within twenty-eight days from the day of the execution of such deed or instrument by the debtor, the same shall be produced and left at the office of the Registrar for the purpose of being registered." The next section, 164, provides for a special form and manner of registration of documents of this kind. It requires that "The date, names, and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the Registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within forty-eight hours after the deed shall have been left at the office as aforesaid, and a copy of such entry shall be published in the *Hong Kong Government Gazette* as soon as reasonably can be done after, but in no case later than ten days from, the time of making such entry."

It is clear that the deed in this case does not fall under the provisions of these sections, inasmuch as it was not proved to have received the requisite assent of creditors. But it was contended, and this in effect was the ruling of the Court below, that this deed being one within the provisions of sect. 165 fell within those of sect. 167, and therefore operated to give the Plaintiffs all the rights of action which would have accrued to assignees in bankruptcy. It will be necessary to examine both these sections. Sect. 165 is in these terms: "Every deed, instrument, or agreement whatsoever," and it may be observed that the term "agreement" is here inserted, which is not to be found in the previous clause, "made and executed, by which a debtor not being a bankrupt conveys, or covenants or agrees to convey, his estate and effects, except such portion thereof as aforesaid, for the benefit of his creditors." It may be further observed that this clause contemplates not only a deed conveying the bankrupt's estate, but an agreement to convey it; the clause proceeds, "or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court shall allow, be registered in the Court; and in default thereof shall not be received in evidence."

This section, although it may possibly include deeds described in the former one, embraces a large class of deeds of a very different character, and extends to "agreements" of several kinds. It is wide enough to comprise almost any written agreement, whether under seal or not, which the debtor may execute, even without the consent of any of his creditors, appointing an inspector or trustee with a view of winding up or managing his affairs, although it does not convey the whole or any part of his estate, or effect a "*cessio bonorum.*" Sect. 166 is to this effect: "Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the Registrar for registration." Their Lordships do not think it necessary to determine whether this last clause refers to the last class of deeds or to the class of deeds before mentioned, or to both. The expression "deed," if taken literally, would not apply to a mere agreement in writing not under seal. But the material question turns on the construction of the 167th section. That section is to this effect: "From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors, and trustees parties to such deed, or who have assented thereto, or are bound thereby, shall," &c. This description appears to be applicable to the different classes of persons who are specified in sect. 163, that is to say, the debtor, the creditors, the trustees, and those who without having assented to the deed are bound thereby; certainly the latter expression would not apply to deeds under clause 165. Then it proceeds, "shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court, and shall respectively have the benefit of and be liable to *all the provisions* of this Ordinance in the same or like manner as if the debtor had been adjudged bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy." In the course of the argument it has been admitted that the debtor under such a deed as the present is not entitled to the benefit of all the provisions in the Ordinance, and that he cannot avail himself of the two contained in sects. 168 and 169. The section proceeds: "And the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor, and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, or effects in bankruptcy."

It appears to their Lordships difficult to suppose that the Legislature could have intended to give this effect to every deed executed under the 165th clause. As before pointed out, a deed might be executed and registered under that clause which would not pass the estate of the debtor to his trustees. If so, how could they have, with respect to that estate, all the rights to be exercised by assignees in bankruptcy? Further, it appears improbable that the Legislature should have intended that a mere deed, or a mere writing without deed, whereby a debtor has conveyed, or has agreed to convey, any portion of his estate to any person under the name of an inspector or otherwise, without the consent of a single creditor, should have the effect of clothing that person with all the rights of assignees in bankruptcy. The difficulty of so construing this clause is very much increased by the two clauses which follow it. The next is sect. 168, which is to this effect: "After the copy of the entry made by the Registrar as aforesaid shall have been published in the *Hong Kong Government Gazette*, no execution or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of the colony, shall be available to any creditor or claimant without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the Registrar, and the seal of the Court, shall be available to the debtor for all purposes as a protection in bankruptcy." It has been admitted that this section cannot apply, partly because it refers to an entry in the *Hong Kong Government Gazette* which would apply only to instruments described in sect. 163, and, further, because it could not have been intended that by merely executing such a deed as has been spoken of under sect. 165, the debtor should be able to protect his property from process. The next section (169) is as follows: "In case any petition shall be presented for an adjudication against a debtor after his execution of such deed or instrument as is hereinbefore described, and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed if the Court shall think fit, and in case such deed or instrument shall be duly registered as aforesaid, the petition shall

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be dismissed." It has been admitted that the words "deed or instrument" here must be narrowed in their construction to deeds or instruments under sect. 163, and that it is impossible to suppose that this section could apply to deeds under sect. 165. But if that be so, if these two sections admittedly do not so apply,—as it is clear they cannot apply,—it seems extremely difficult to regard the section immediately before them as applying. Their Lordships are disposed to read these three sections together, to treat sects. 168 and 169 as supplementary to sect. 167, and to hold them all as applying only to deeds coming within the provisions of sect. 163. Sect. 165 may be described as an isolated section containing an isolated provision, doubtless a very valuable one, to the effect that if a debtor chooses to execute any deed or agreement relating to the management of his property, or the liquidation of his debts, or his release from liability, he shall not keep it secret, but shall register it for the information of persons whom it shall concern, under the penalty of its not being admissible in evidence unless he does register it.

Such being the view which their Lordships would have been disposed to take of this Ordinance if there had been no authority on the subject, they think it right now to refer to some of the cases decided upon the construction of the Act of 1861, the clauses of which, as before observed, are almost identical, in reference to the subject-matter now under discussion, with the clauses in the Ordinance of *Hong Kong*.

The first case to be referred to is the case of *Ex parte Morgan* (1), which was decided by Lord *Westbury*, than whom, it will be admitted, no man was more competent to construe the *Bankruptcy Act* of 1861. The part of the case material to the present inquiry is correctly stated in the first part of the marginal note: "The registration of trust deeds under the 192nd and under the 194th sections of the *Bankruptcy Act*, 1861, although in practice performed by the same officer, are distinct and have different operations; and where, for the want of the papers required by the orders, registration under the former section had been refused by the officer, and the applicant had registered the deed under the 194th section: held, that the registration did not prevent the

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(1) 1 De G. J. & S. 288. 9 Jur. N.S. 581,

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deed, which was an assignment of all the debtor's property, from being an act of bankruptcy." It should be here observed that the 192nd, 193rd, and 194th sections of the Act of 1861 correspond respectively with the 163rd, 164th, and 165th sections of the *Bankruptcy Ordinance* of *Hong Kong*. In the course of his judgment Lord *Westbury* observes: "The protection intended by the statute to be given to a deed under the 192nd section was a protection extending only to such deeds as should be duly registered in the manner and form required by that section and the 193rd, which is consequent thereon. The immediate question which I have to determine is, whether the deed before me is a deed which has been so registered." Then he says: "To determine that question it is necessary to observe, that in addition to the registration prescribed by the 192nd and 193rd sections, it appeared to the Legislature expedient to require another form of registration for deeds which did not exactly comply with the requirements of the 192nd section, and accordingly the 194th section gives the power and imposes the obligation of registering any deed of composition or deed for the benefit of creditors, which has not been registered under the 192nd section in the Court of Bankruptcy; and the words are material. A deed under the 192nd section is to be registered by the deed being brought into the office of the Chief Registrar, and the solemnities attending its registration are clearly defined. A deed under the 194th section is directed to be registered simply in the Court of Bankruptcy. For convenience' sake, by a general order, I have given both forms of registration to the same officer and to the same office; but the registration under the one section is very different from the registration under the other section. The 194th section was introduced with a double view. First, because it was apprehended that many deeds of composition might still be made which would not be brought under the 192nd section, and which might have an injurious effect by reason of their being secret deeds of arrangement. The obligation, therefore, was imposed upon all persons, parties to such a deed, of bringing it in to be registered within twenty-eight days after its approval in the Court of Bankruptcy, and a penalty is attached in case of default, that the deed shall not be receivable in evidence. Another object of the enactment was this: it was

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felt that possibly many a deed of composition might not be perfected in the manner required by the 192nd section within the twenty-eight days, and yet that all the creditors might be willing to accede to such a deed; and, therefore, power was given to register, under the 194th section, a deed which did not exactly comply with the requirements of the 192nd section." Then he goes on to say: "These two forms of registration, therefore, being very different, the consequences of the one form do not attach to the other. The consequence of an observance in every respect of the terms of the 192nd section is that the deed is binding on the minority of the creditors who do not execute or assent to it. No such consequence is attached to registration under the 194th section."(2) And accordingly he held that the conveyance there, being a conveyance of all the debtor's property, and not being registered under the 192nd and 193rd sections, was an act of bankruptcy.

It may be desirable to refer next to the case of *Symons* v. *George* (1). Their Lordships cannot help thinking that the marginal note of that case, to which the learned Judges in *Hong Kong* appear to have referred, may somewhat have misled them. The marginal note is to this effect: "A trust deed in the form given in Schedule D. of the *Bankruptcy Act*, 1861, and registered, &c., according to sect. 192, though not assented to by the prescribed majority of creditors, is by virtue of the 194th and 197th sections" —the 197th section corresponding to the 167th section in the Ordinance—"subject to the jurisdiction of the Court of Bankruptcy." It should be observed, however, that the real point decided in this case was no more than this,—that the debtor having conveyed to certain trustees his effects and property, to be administered for the benefit of his creditors as if in bankruptcy, and that property having been delivered in pursuance of the deed of conveyance, it was held that the operation of the deed at Common Law was to pass the property to the trustees, although, incidentally, no doubt, an opinion such as that indicated in the marginal note is expressed. It was upon the same *ratio decidendi* that the decision was affirmed in the Exchequer Chamber. It should be observed that the case which has been before quoted,

(1) 33 L. J. (N.S.) (Ex.) 231. 10 Jur. N.S. 637.
11 Jur. N.S. 713

(2) S.C. 9 Jur. N.S. 561

decided by Lord *Westbury*, was not drawn to the attention of the Court.

In the subsequent case of *Pearson* v. *Pearson* (1) the Court of Exchequer had their attention more pointedly called to the provisions of the *Bankruptcy Act*, and also to the decision of Lord *Westbury*. It was there held that the legal right to sue in respect of debts and choses in action of the debtor did not pass to his trustees under a deed which fell within the provisions of section 194, and that section 197 did not apply to such a deed so as to give to the trustees appointed under it the rights to sue of assignees in bankruptcy. That is the very point to be determined in this case. If the trustees have not by virtue of the operation of sects. 194 and 197 of the English Act (corresponding to sects. 165 and 167 of the Ordinance) the power to sue in respect of a chose in action, it is because they have not the rights of assignees in bankruptcy, and if so, it follows they have not the power of assignees in bankruptcy to sue in respect of a fraudulent preference. This case was dealt with by the same Judges, with Baron *Channell* in addition, who had decided the case of *Symons* v. *George* (2), and they came to the conclusion, expressed by Baron *Bramwell*, that the provisions of sect. 197 apply only to deeds entered into in conformity with the provisions of sect. 192. Their Lordships cannot help observing that the learned Chief Justice, when speaking of what he calls the *dicta* of the Judges in this case, and observing that he could not explain them, appears not to have appreciated the full force and effect of the case itself as a clear decision of the very point now in question.

The only other case to be noticed is a case before Vice-Chancellor *Bacon*, of *Ex parte Atkinson* (3), in which, undoubtedly, the Vice-Chancellor does not seem to have accepted in its full breadth the view of the Court of Exchequer that sect. 197 did not apply to deeds under sect. 194. It is to be observed, however, that he does not question the decision in *Pearson* v. *Pearson* (1). He says: "With most sincere deference therefore to the learned Judges by whom that case was decided, and not presuming to question their decision upon the subject to which it applies, I must

(1) Law Rep. 1 Ex. 310. 12 Jur NS 589
(2) 33 L. J. (N.S.) (Ex.) 231. 10 Jur NS 637
(3) Law Rep. 9 Eq. 736. 11 Jur NS. 713.

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say that it seems to be no authority for the proposition that because a deed of assignment registered under sect. 194 does not enable the assignee to sue in his own name for a chose in action which was the property of the assignee before the deed, therefore the 197th section has no application to such a deed, and that all the power and jurisdiction which by the 197th section is given to the Court of Bankruptcy over every such deed after registration is wholly ousted." The effect of this decision would appear to be that, although the learned Vice-Chancellor yields to the authority of the case in the Court of Exchequer so far as it holds that the provisions of sect. 167 do not apply to deeds under sect. 194, so as to give to trustees under them the powers of assignees in bankruptcy, still he thinks that there is some jurisdiction in the Court of Bankruptcy to administer the property. What he actually decided was that the Judge sitting in bankruptcy had power to summon a person to give evidence as to an alleged transfer of property comprised in such a deed, and to commit the witness for contempt for refusing to be sworn. This decision therefore, whether the Vice-Chancellor be right or wrong in the application which he gave to section 197, as to which their Lordships do not think it necessary to pronounce any opinion, is certainly not an overruling of the decision of the Court of Exchequer in *Pearson* v. *Pearson* (1), which governs the present case.

Their Lordships have therefore come to the conclusion, both upon the decided cases, and upon the construction of the Ordinance independently of them, that the Plaintiffs have not a right to sue for the purpose of setting aside the conveyances on the ground that they are a "fraudulent preference" within the meaning of that term in the bankruptcy law.

It has, however, been further argued that, even assuming this, the transaction now impeached constituted a fraud so much exceeding that of a mere fraudulent preference that, independently of any assistance from the bankruptcy laws, the Plaintiffs, by their mere appointment as trustees on behalf of the other creditors, would be entitled to sue to set it aside. Upon this subject their Lordships think it enough to observe, first, that this point does not appear to have been argued or taken in the Court below, and that they are always reluctant to decide upon points which have not been submitted to the inferior Court; and, secondly, that there does not appear to them any ground whatever for supposing that there was any greater fraud in this case than a fraudulent preference in contemplation of the bankruptcy laws, if indeed there was such a fraudulent preference, which, this part of the appeal not having been fully argued, they by no means affirm.

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(1) Law Rep. 1 Ex. 310. 12 Jur. N.S. 589

On these grounds their Lordships will think it their duty humbly to advise Her Majesty that the decision under appeal should be reversed. There will be the usual order with respect to costs in the appeal, and the Court below.

Solicitors for the Appellants: *Druce, Sons, & Jackson.*
Solicitors for the Respondents: *Freshfields & Williams.*

[HOUSE OF LORDS.]

H. L. (E.) JESSE JONES . . . . APPELLANT;

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AND

March 25, 26. JOHN GORDON . . . . RESPONDENT.

Bankruptcy—Bills of Exchange—Fraud.

By arrangement previously made between the parties, *G.* drew bills on *S.*, and *S.* drew bills on *G.*; the acceptances were, in form, duly given. Both *G.* and *S.* were at the time, and were known by each other to be insolvent, and to be contemplating bankruptcy. Some of these bills, amounting to £1727, were purchased by *J.* for a sum of £200. *J.* had before been a discounter of bills, but not a purchaser of them. He knew at the time that *G.* was in embarrassed circumstances, but believed that *G.* possessed assets. He knew too that certain persons could give him full information as to *G.'s* affairs, but he made no inquiries from them. He declined to discount these bills, but purchased them. *G.* became bankrupt. *J.* proposed to prove against *G.'s* estate for the full amount of the bills. The trustee in bankruptcy gave him notice that "at the date of the bankruptcy of *G.* you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against *G.* thereon, if he had not become bankrupt." In the County Court, in Bankruptcy, this objection of the trustee was adopted, and the proof of *J.* upon the bills was restricted to the £200. The Chief Judge in Bankruptcy reversed this decision, and ordered a proof to be allowed for the full amount of the bills. The Court of Appeal reversed this order, and restricted the proof to the amount paid for the purchase of the bills. On appeal to this House:—

Held, first, that the form of the notice was sufficient under the Bankruptcy Orders of 1870. Secondly, that the order of the Chief Judge in Bankruptcy must be discharged, for that, under the circumstances proved in the case, *J.* must be taken to have had notice that the bills were fraudulent.

Per LORD O'HAGAN:—*Quœre*, whether the argument that the notice of objection to the title of a holder of bills was too vague and general in its terms, could be brought forward in this House on appeal, where no such point had been taken in the Court below.

Per LORD BLACKBURN:—Though since the repeal of the usury laws, the fact of taking a bill at considerable undervalue is not, of itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting *bonâ fide*, in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him.

THIS was an appeal against a decision of the Court of Appeal reversing a decision of the Chief Judge in Bankruptcy (1).

The Respondent was the trustee of the estate of two bankrupts, named *John Gomersall* and *James France Gomersall*, who formerly carried on business at *Dewsbury*, in *Yorkshire:* the Appellant was a person who, for a sum of £200, had purchased certain bills of exchange accepted by the *Gomersalls*, and who claimed to prove against their estate, not the sum of £200 the actual amount of his purchase-money, but the sum of £1727 2*s*., being the nominal amount of those bills. The facts were these:

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(1) 1 Ch. D. 137.

For several years before 1874 the *Gomersalls* had employed one *Searby* as their commission agent in *London*. In the end of 1870 they began to draw bills on him, always, at first, furnishing him with the means of meeting those bills; but in 1874 they drew bills on him, or he became the drawer and they the acceptors, and a system of what is commonly called the making of "accommodation bills" was established between them. The character of the transactions appeared from the various letters which passed between the parties. Some are subjoined. The *Gomersalls* in January, 1874, wrote to *Searby*, "Enclosed we hand you bill duly accepted. Try *Lovering*, but before doing so get to know where he would discount it, and who he banks with, as you know it would not do for our bank or yours to know it, and so be careful in this point and oblige, &c." Other letters of a similar kind were written, and on August 20th, 1874, they wrote:

"What we want you to do is to draw on us for same amounts we have drawn upon you, and if the bank is queer to put them into a third parties, to hand to some business friends of yours, say *John Lovering*, or some such man, one that you and us could have confidence in, but do not mention it to a single person breathing, as we are not afraid but what the bank will come to. We do this suppose they do not and to make you safe. If they should write you take no notice but leave it to us. Withdraw all moneys from your bank perchance they might take extreme measures and put an attachment on your banking account. See to this early in the morning."

In another letter giving *Searby* caution as to his proceedings, and as to the bankers, the *Gomersalls* said, "File your petition, Monday, without delay. We shall file ours on Tuesday or Wednesday if they do not retract the summons already sent." There were other letters of a similar character.

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Searby drew fourteen bills on the *Gomersalls*, which were the bills now under discussion. The bills were accepted by the *Gomersalls*, and returned to *Searby*, who thereon tried to get them discounted, but failed. There were fourteen of these bills in all, and *Lovering* (the person specially mentioned in the *Gomersalls'* letters as "a friend" of *Searby*) offered some of them to a person named *Bennett* for discount or for sale. Ten of them were purchased by *Bennett* for a sum of £250, and the remaining bills (amounting to £1757 2*s.*) were purchased by *Jones* for £200. These transactions took place at the end of August, 1874. On the 5th of October, 1874, the *Gomersalls* filed their petition for liquidation; they were adjudged bankrupts on the 8th of October; proof of the bills was tendered, and *Jones* claimed to prove for £1727 2*s.*, the nominal amount of the bills he had purchased. Mr. *Gordon*, who had been appointed trustee under the liquidation, sent to *Jones* a notice of objections to his claim, which claim he, *Gordon*, rejected. The second of these objections was in these terms: "That at the date of the bankruptcy of the *Gomersalls* you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against them thereon, if they had not become bankrupts." The County Court Judge adopted the objection, and ordered the proof against the estate to be limited to £200, but his decision was overruled by the Chief Judge in Bankruptcy, who ordered that the proof for the nominal amount of the bills should be received and be admitted to dividend. This decision was, in its turn, overruled by the unanimous decision of the Court of Appeal, and the proof was ordered to be limited to the sum of £200 (1). This appeal was then brought.

Mr. *A. G. Marten*, Q.C., and Mr. *Cooper Willis*, for the Appellant, insisted, first, that the form of notice given by the trustee in bankruptcy was insufficient under the general Bankuuptcy Rules of 1870 for want of clearly specifying the nature of the objection; next, they contended that there was nothing here which could be pretended to be a preference of a particular creditor. The bills were sold, as goods might have been sold, to raise money for the *Gomersalls*. Such a sale of goods would have been valid, and so was this sale of bills. *Jones* knew nothing of any fraud, and such a knowledge could not be presupposed against him. As against the holder of bills of exchange, no mere presumptions were admissible. The negotiability of bills of exchange could not be affected in that way. There was nothing here which subjected the holder of these bills to a charge of taking part in fraud; yet, without being liable to that charge, he was entitled to recover the full amount of the bills. On the face of them, the bills were perfectly regular. Every one knew that in the ordinary way of commercial transactions, bills of certain firms become liable to doubts and suspicions. That made the dealing with them a matter of risk. The person who, under such circumstances, was willing to incur the risk, and advance real money upon bills of that sort, might be accused of rashness but could not be accused of fraud, and without the imputation of fraud he was entitled to recover the amount of the bills on which he had advanced his money. For the advantage of commerce, bills of exchange were negotiable instruments which passed freely, and which, appearing on the face of them, as these did, to be valid, became on mere transfer, and certainly on indorsement, valid securities in the hands of the holders. Unless there was plain evidence establishing against the holders a charge of fraud or corruption, they were entitled to recover. There was nothing of the sort here. All that was required to be done in the delivery and transfer of bills of exchange had been done here, and the parties to the bills, and the estates of those parties, were liable upon them. [*Ex parte Bloxham* (1), *Byles* on Bills (2), *Castrique* v. *Buttigieg* (3), and *Denton* v. *Peters* (4) were referred to.]

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(1) Nom. *In re Gomersall*, 1 Ch. D. 137.

Mr. *De Gex*, Q.C., and Mr. *Finlay Knight*, for the Respondent:—

The form of notice was amply sufficient. There was no need here to discuss in any way the general doctrine of the negotiability of bills of exchange, but the circumstances shewed that, while that general doctrine existed in full force, a case was established which left no doubt that the purchase of these particular bills had been effected with a full knowledge of the real facts, and with the purpose of gaining an advantage for the purchaser at the expense of the ordinary *bonâ fide* creditors of the *Gomersalls.* If the evidence supported that view of the case, there was no pretence for saying that such a transaction could stand. The undoubted facts shewed such a case as to throw on the holder the *onus* of proving *bona fides* and value, and he had not proved value beyond a certain amount.

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(1) 6 Ves. 449.

(2) Ch. xi. Ed. 1874.

(3) 10 Moo. P. C. 94.

(4) Law Rep. 5 Q. B. 475.

[*Marston* v. *Allen* (1), *Bailey* v. *Bidwell* (2), *May* v. *Chapman* (3), and *Hall* v. *Featherstone* (4), were cited.]

Mr. *Marten* replied.

LORD O'HAGAN:—

My Lords, you have had the advantage of an able and elaborate argument of the case, and the farther advantage of a report of the full discussion which it underwent in the Courts below; and I believe that your Lordships see no reason to doubt the perfect correctness of the judgment of the Court of Appeal. For my own part, I think it manifestly right; and I am glad that the authority of this House will sustain it, without hesitation or reserve, in the interest of the mercantile honour and security of the country.

The facts of the case are peculiar, though the principles applicable to them seem to me plain and well-established. As was observed in the Court of Appeal, although frauds on the eve of a bankruptcy are common enough, they have usually been frauds on persons advancing money or selling goods to bankrupts; but here the fraud was not attempted on the persons so advancing or selling, but on the general body of creditors. It is, so far, novel, and all the more dangerous on that account; but I am satisfied that the settled law gives ample power to meet it: and we are bound to apply that law with vigour and efficiency, if we would discredit unconscientious speculation, and prevent the repetition of transactions which the only one of the Judges in the Courts below who ruled in the Appellant's favour, has rightly pronounced "nefarious."

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(1) 8 Mee. & W. 494.

(2) 13 Mee. & W. 73. See Parke, B., at p. 76.

(3) 16 Mee. & W. 355.

(4) 3 H. & N. 284. 4 Jur. N.S. 813

A preliminary point was raised grounded on the Bankruptcy Rules of 1870, alleging the insufficiency of the trustee's notice of objection, by reason of its too great generality. I have grave doubts whether such an objection ought now to be entertained, as it does not appear to have been taken in the Court of Appeal; and I think your Lordships would scarcely be disposed to permit a suitor who has allowed his opportunity of urging such a point to lapse, to raise it after judgment has been given against him, and his adversary has encountered expense and delay which would have been spared if it had been successfully urged in the first instance. But, even if the argument be admissible, I think there is nothing in it. The notice of objection to proof appears sufficient, under the Bankruptcy Rules of 1870. It indicates, clearly enough, the ground to be taken against the Appellant's claim, and, having regard to the nature of the transaction and the known principles on which alone it could be impeached, your Lordships can have no doubt that he was well informed of the general case to be made against him. It was not necessary or possible to go into details. A notice is not a pleading; and the doctrine that, in the latter, fraud, to be availed of against its perpetrator, should be specifically stated, has no application to the former. The defence comes too late; but, at all events, it is untenable.

The real questions in the case are substantially two. The Appellant claims against the estate of the bankrupts, of whom the Respondent is trustee, the sum of £1727 2*s.* in respect of four bills of exchange, drawn by a Mr. *Searby*, accepted by them, and purchased by the Appellant from their agent for the sum of £200. Your Lordships are required to determine: First, whether the circumstances under which the bills were drawn and accepted tainted them with fraud? And, secondly, whether the Appellant had such notice of that fraud as disentitles him to recover?

The bankrupts carried on business at *Dewsbury* under the name of *Gomersall Brothers;* and *Searby* was a commission agent in *London*, selling goods for them. They were in the habit of drawing bills upon each other to a large extent, bills without any consideration. It is perfectly plain, upon the correspondence, that these bills were drawn—in the words of one of the Lords Justices—"for the fraudulent purpose of raising money so as to cheat the creditors of both drawer and acceptor." Or, as another learned Judge expressed it, "the bills were mere shams and fictitious things." The parties to them were in a condition of utter insolvency; and both were contemplating bankruptcy whilst they strove to palm their worthless paper on the commercial public.

The evidence of this is conclusively furnished by the letters in proof. I do not trouble your Lordships by reading them again as you have heard them repeatedly, but I shall call your attention to one or two passages which put beyond controversy the relations of these correspondents and the motives of their action. The bankrupts wrote to *Searby* on the 20th of August; [His Lordship read a number of passages from the letters such as have already been set out, and proceeded:—] Comment on such a correspondence would be idle. It establishes the whole case of the Respondent on the first branch of it—the insolvency of the parties; the total want of consideration for the bills; the imminence of bankruptcy; and the intention to defraud. As between the juggling concoctors of the bills it is quite plain that they were nullities, and that no claim could have been established by the one against the other.

But then arises the second question—How far is the Appellant affected by the fraud? He alleges that he purchased the bills for the sum of £200; and, although that sum was not one-eighth of the apparent value, if the purchase was made *bonâ fide*, without notice of the fraud or knowledge of it, or means of knowledge, or duty to institute inquiry reasonably suggested by the circumstances of the case, which would have afforded such knowledge, he would be entitled to sue the acceptor or the drawer, or to claim his dividend on the bankrupt's estate for the entire amount.

On the facts admitted by himself, I submit that your Lordships cannot hold him so entitled.

This is his own sworn statement of the mode in which he became possessor of the bills:—

"These bills on which I have proved were brought to me by Mr. *Lovering*. He brought them all together. He offered me no other. I had discounted bills brought to me by him before. I occasionally discount bills. These were left with me for a day or two that I might make inquiries about them. I did so. I never saw *Searby* to my knowledge to that time. I did not want him, and I did not ask Mr. *Lovering* about him. I could have found him if I desired it. I did not know of Mr. *Bennett* having any bills. I had no communication with him about these bills. I inquired of one or two clerks I knew in the City about the credit of Messrs. *Gomersall*. I thought it a very risky thing from the information I received. I did not inquire of any one as to the consideration for the bills or any of them. I did not ask *Lovering* anything about the consideration. I am not aware if he had any interest in them. I afterwards advanced £200 for them. I refused to discount them. I never bought any other bills before from any one. I made no inquiry as to the consideration. I generally buy as cheap as I can. I presumed the bills were *bonâ fide*. I have received no dividend from *Searby's* estate. *Lovering* gave me no reason for his having the bills. I think I offered to buy them. I declined to discount them. This was the latter end of August. The cheque I gave is dated the 31st August."

It is to be noted that the bills so sold bore false dates, and that the sale so made was in the month of August, after the letters, to which I have called your Lordships' attention had indicated the purpose of bankruptcy by the drawer and acceptor, and the scheme by which they hoped to defeat the claims of creditors. But as we have no proof that *Jones* knew of the ante-dating or of the correspondence, I do not think that these things can be fairly pressed against him. What seems to me conclusive is his own statement of his own case. It puts, in my mind, beyond dispute, that he must have known the embarrassed circumstances of the acceptors and the drawer. His inquiries as to Messrs. *Gomersall* led him to the conclusion, he admits, that it was "a very risky thing" to deal for these acceptances; and, as to *Searby*, the transaction itself was perfectly demonstrative of his insolvent condition. This draft made him answerable for above £1700, and it was purchased, with all his liability upon it, for £200. The bills, according to Mr. *Lovering's* account, had been hawked about and nobody would have them; and when the Appellant took them, without inquiry or explanation, he must have been thoroughly assured of the incapacity of the parties to meet their engagements. In his affidavit, he says he was informed that the acceptors, although in difficulties, "were possessed of assets," and he speculated on the possibility of rendering those assets available to the detriment of *bonâ fide* creditors. But that very allegation tends to make it plain that he purchased, having no expectation of recovering against *Searby*, and he had none, because the circumstances satisfied him, as they must have satisfied any reasonable being, that *Searby* would not be able to discharge his liabilities.

Assuming, then, that the Appellant had knowledge of the insolvency of the acceptors and the drawer, what was the nature of the transaction of sale? For a sum of £200, a claim to £1727 is sold, and no sort of reason is sought or given for a proceeding so abnormal and extraordinary. Could any man of intelligence,—any commercial man,—any man conversant with bill transactions,—and such the Appellant was,—have failed to believe that the offer of such terms was clouded with suspicion and suggestive of fraud? Could any honest trader, disposed to realise advantage only from just and open dealing, have failed to inquire as to the motives which suggested such a strange proposal, and to seek some explanation that might reconcile it with fair play to all concerned?

The Appellant's hope, avowedly, was to clutch a portion of the assets of the bankrupts, through the transfer of securities of a most questionable kind; and is it unjust to him to suppose that he shrank from investigation, because he apprehended that it might lead to discovery which would baulk him of his object, and make his claim, as a purchaser with notice of the fraud, inadmissible in a Court of justice?

At all events, he deliberately abstained from all inquiry. He had the fullest opportunity of making it. *Lovering*, he says, "gave no reason for having the bills:" and *Lovering* never was interrogated about them. *Searby* was within his reach—"I could have found him," he says, "if I desired it." But he desired nothing of the kind. He did not wish to ask,—how it came to pass that *Searby* sold his large liability for a sum so small? He did not desire to put a question as to the consideration for the bills; or why, or where they had been concocted, or what would be the effect of the transfer of them on the creditors of the conspiring insolvents? Any question of the sort he felt might get an inconvenient answer; and having the fullest means of knowledge, he wilfully refused to obtain it. Of the reason of his refusal your Lordships cannot entertain a doubt.

Very properly, reliance was placed by the Respondent's counsel on the inadequacy of the price offered for the bills, considered as valid and subsisting securities; and it was fairly urged that as, in the criminal law, the purchase of goods at a gross undervalue is pregnant evidence of guilty knowledge, so, in this case, the buyer of above £1700 worth of securities for £200 must reasonably have such knowledge imputed to him. It was argued on the other side that as no more could be got for them in the market, the price was adequate, and that therefore such an inference should not be drawn. But this is a plain fallacy. If other people were wise enough and honest enough to avoid a fraudulent transaction, their abstinence can hardly avail the man who does not shrink from it, in spite of the flagrant *indicia* of impropriety.

My Lords, the law upon the subject is clear, and in full accordance with sound policy and common sense. It is thus stated in a work of very high authority: "A wilful and fraudulent absence of inquiry into the circumstances, when they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a suspicion or belief that inquiry would disclose a vice in the bills) amount to general or implied notice" (1). And Lord *Wensleydale* has said: "Notice and knowledge mean not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes" (2).

My Lords, I suggest that the case before your Lordships comes plainly within the operation of these principles. The circumstances, beyond all doubt, invited inquiry, and made it, to an honest man, unavoidable. The means of knowledge were in the Appellant's power. He dealt personally with *Lovering*. He had *Searby* at his call. He never questioned the one or sent for the other. His conduct was wholly inexplicable, save on the assumption of his suspicion or belief—which any person of ordinary sense and experience must have entertained—that inquiry would disclose a "vice in the bills." He was determined that notice of that vice should not be used to deprive him of his chance of a dividend, and tried to avoid it by "wilfully shutting his eyes," and evading all inquiry. My Lords, he has not succeeded. The legal principles to which I have adverted govern the case; and the notice which they enable your Lordships to fix upon him will deprive him of profit from the fraud.

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(1) Byles on Bills, 119, and cases there cited.

(2) Lord *Wensleydale*, *May* v. *Chapman*, 16 M. & W. 361.

Mere negligence might not disentitle him to recover. Mere inadequacy of consideration might not, in certain circumstances, bar his claim. In spite of both, he might have proved the integrity of his motives and the purity of his conduct. But, without disregard to undisputed facts, (which seem to me to make it palpable that his ignorance was wilful, if it was not, as I believe it was, only simulated,) this transaction cannot be allowed to stand. If it could, the creditors of an insolvent would never be sure that he might not, by a trick at the moment when his circumstances had become most desperate, and when he was actually preparing to go into bankruptcy, transfer the right to prove on his estate to a person with whom he had had no real dealings, and who had no real claim upon him, so as to make the dividend of legitimate creditors inadequate or wholly worthless. Lord Justice *Mellish* calls this "a new fraud;" and the invention of it too characteristic of a period which has been dishonourably marked by affairs of the kind. With that eminent and lamented Judge I think that we should be "very unworthy descendants" of those who have heretofore administered our law, if we allowed it to prevail. If we needed to better the example of those who established the doctrines which guard the rights of creditors, I am sure your Lordships would not hesitate to give those principles a salutary extension. But this seems to me unnecessary. The existing law, strictly applied to the circumstances with which we have to deal, is abundantly sufficient to enable you to do plain justice by affirming the judgment of the Court of Appeal.

Whether the Appellant should be allowed to prove for the £200 which he paid to *Lovering*, is not now a question for decision, as there is no cross-appeal. The Lords Justices ruled that he should be, and whatever may be my own impression of the matter, their

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decision in that respect is unchallenged, and I shall say nothing of it.

On the whole, I advise your Lordships that the judgment should be affirmed and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. I should be extremely sorry to say anything which should cast doubt upon the principle that a bill of exchange, or a negotiable instrument of that sort, is negotiable to the fullest extent of its kind. The negotiation of these bills of exchange, in a mercantile country like this, is of very great value. I take it to be perfectly clear that when a bill of exchange is (as these bills of exchange are) on the face of it a good bill, and there is nothing on the face of it to shew the contrary, it *primâ facie* imports value, *primâ facie* a bill of exchange is a good bill of exchange, and it is necessary to shew the contrary. I take it that even if the contrary is shewn, if it can be shewn that a bill of exchange in its inception was not a good bill of exchange, and that originally it was obtained by fraud, yet a person who has taken it *bonâ fide* and for value is entitled to sue upon it if the parties are solvent, and is entitled in a case of bankruptcy to prove upon it, even though it is shewn that there was an infirmity or vice in the title of some of those persons who passed it, unless the knowledge of that vice is brought home to him who took it.

But, then, I think it is clear both upon the authorities, and also, as it seems to me, upon good sense, that when it is shewn that a bill of exchange was a fraudulent one, or an illegal one, or a stolen one, in any one of those cases it being known that the person who holds it was a party to that fraud, to that illegality, or to that theft, and therefore could not sue upon it himself, the presumption is so strong that he would part with it to somebody who could sue for him that that shifts the burden. Then, instead of the bill of exchange being *primâ facie* good, as it otherwise would be, so that the person holding it is entitled to recover upon it without proof of more, that shifts the burden. That has been decided over and over again. The consequence is, that the man who sues has in that case the *onus* upon him to prove that he gave value. I should be unwilling to say precisely whether it shifts the *onus* upon him to shew that he gave value *bonâ fide,* so that, although he gave value he must give some affirmative evidence to shew that he was doing it honestly, or whether the *onus* of proving that he is dishonest, or that he had notice of things that were dishonest, remains on the other side, although he is bound to prove value. The language of the quotation from Mr. Baron *Parke* would seem to shew that the *onus* as to both is shifted; but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case. I have no doubt that in proving value, it may be proved that he himself took the bill under such circumstances, that although he gave value he could not sue upon it.

Farther, my Lords, I think it is right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to shew that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to shew that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris,* or when it is sought to be proved against the estate of a bankrupt, it is necessary to shew that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty. I think, my Lords, that that is established, not only by good sense and reason, but by the authority of the cases themselves.

Now, my Lords, I pass from the general question to the particular case before us. These bills of exchange would seem to be good bills of exchange; there is nothing wrong upon the face of them, but although they purport to be drawn as good bills would be drawn, yet the external evidence proves beyond all doubt (I will not trouble your Lordships by repeating the letters which have been read) that at the time these bills were drawn, and at the time they were indorsed, *Searby* the drawer, and *Gomersall* the acceptor were both intending to become bankrupts, not simply that they were both insolvent and likely to become bankrupts, but that they had it actively in their minds that they were going to become bankrupts, and they both were aware and knew that if they could put these bills of exchange in issue, and get them circulated into the hands of an honest holder (of course they would have preferred that it should be an honest holder rather than a dishonest one), that man would come, not upon them personally, but upon the estate after they were bankrupts, and take away from their creditors as many shillings in the pound of the assets as the dividend would amount to upon the nominal amount of those bills, and not upon the sum actually advanced on them.

There was an elaborate discussion of the matter by the late Lord Justice *Mellish*, for whom no one can have a greater respect than I have, to prove that such being the transaction it could not possibly stand in a Court of Bankruptcy; to shew that such a bill

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could have been proved neither by *Searby* nor by any one to whom, in contemplation of bankruptcy (for I consider that a material element), it was issued in order that he might, advancing a small sum upon it, get from the dividends in the Court of Bankruptcy the full nominal amount of the bills. There was an elaborate argument to shew that that would have been a fraud upon the bankruptcy laws, and that the bills could not have been allowed to be proved, either in the hands of *Searby* or of any one who took them with notice that there was something wrong about the bills, the notice being in the manner and to the extent I have already mentioned. No one who took with notice could sue; that must be the result. It did not require, I think, so much elaborate argument to shew that, but I have not the slightest hesitation in advising the House to affirm in that particular the judgment of the Court below.

Then, my Lords, comes the important question, is there enough here to shew that *Jones*, who gave £200 upon these bills, the nominal amount of which was £1727, had notice to the extent to which, as I have mentioned, notice must be proved that there was something wrong about the bills; that they could not have been proved against the estate of *Gomersall* by *Searby*, the holder, and that they were brought to him to get a small sum for them, because they could not have been issued without? Was there enough to lead *Jones* to a suspicion of that, and therefore to call upon him to make inquiries, or if he did not make inquiries, was there enough to shew that that must have been wilful on his part, and because he thought that if he did make inquiries the result would be unfavourable? I think it is necessary to go as far as that, and I think the evidence amply goes as far as that in this case.

Mr. *Jones* gives two accounts of his purchase of the bills. One of them is in his second affidavit, where he says that the bills "were brought to me," "and offered to me for discount, and from inquiries I then made I received information that the acceptors would be unable to pay the said bills in full as they were in difficulties, but that they were possessed of assets, and that there was a fair prospect of my being able to obtain payment of parts of the amount made payable by the said bills. The bills were left in my hands for a few days, and on the 31st of August last I agreed to purchase the same for the sum of £200." I read that, my Lords,

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because it seems to me that Mr. *Jones* there states, without disguise, the important and material fact that he was aware that *Gomersall & Co.'s* bankruptcy was in contemplation, that he was aware that they had assets, that he was aware that he would get his share of the dividends upon the full amount of the bills of exchange, namely, £1750, and that he thought that would be enough to repay him the £200, and certainly, therefore, that he was quite aware of that material and cardinal fact that the bills were issued and discounted in contemplation of bankruptcy. When he is examined *vivâ voce* he says: "The bills were brought to me, the bills were left with me for a day or two that I might make inquiries about them. I did so. I never saw *Searby* to my knowledge at that time. I did not want him, and I did not ask Mr. *Lovering* about him. I could have found him if I desired it." Then he goes on after a little while and says: "I made no inquiries of any one as to the consideration for the bills, or any of them. I did not ask *Lovering* anything about the consideration. I am not aware if he had any interest in them. I afterwards advanced £200 for them. I refused to discount them. I never bought any other bills before from any one. I made no inquiry as to the consideration. I generally buy as cheap as I can. I presumed the bills were *bonâ fide*. I have received no dividend from *Searby's* estate. *Lovering* gave me no reason for his having the bills."

Now, my Lords, in an ordinary case a man is entitled to presume a bill to be *bonâ fide*, but I think it becomes a question whether, under the circumstances which this statement discloses, *Jones* had a right to presume that the bills were *bonâ fide*, and whether he did not really know that if he inquired into them, or spoke to *Searby*, or inquired of anybody else about *Searby*, he would have been confirmed in what he himself suspected, that the bills were not *bonâ fide*. Consequently, although if *Searby* had got an honest, ignorant, innocent man without knowledge to give value for them that man would have been able to prove, yet he, *Jones*, would be then fixed with clear knowledge which would prevent him from being a person entitled to recover, and therefore he abstains from making inquiries.

I think, my Lords, that since the repeal of the Usury Laws we can never inquire into the question as to how much was given for a bill, and if *Searby* was in such a position that he could have proved against the estate it would have been no objection at all that he conveyed these bills to another for a nominal amount, that he sold bills nominally amounting to £1727 for £200. Although I think that could not have been inquired into, yet the amount given in comparison with the apparent value is an important piece of evidence guiding us to a conclusion as to whether or not it was a *bonâ fide* transaction. I am sure of this, that in criminal cases the general evidence that is given to shew that the receiver of goods which were stolen knew that they were stolen is that he has given a great undervalue for them. That is not by any means conclusive, because it may very well be that he has given the undervalue under circumstances which do not suffice to prove that he had a felonious intention, or a felonious knowledge, which would be required to make him guilty. In like manner, I think if it is shewn that a considerable undervalue was given for bills, although that alone would probably not be sufficient, it is an element, and an important element, in considering whether the man who gave that undervalue was *bonâ fide* doing it because he was in honest blundering and stupidity taking the thing without knowing that he was committing or assisting in fraud, or because he had a suspicion that he would deprive himself of a good bargain if he made too much inquiry and so had it brought home to him that there was fraud.

My Lords, with regard to this I do not know that I can do better than refer to what the late Lord Justice *Mellish* says about these particular circumstances (1). He says that Mr. *Jones* "manifestly knew that both parties" (the drawer and the acceptor) "were hopelessly insolvent, probably that the drawer could pay nothing at all; but that the acceptors, although likely to become bankrupts, had assets sufficient to pay a dividend." I have always pointed out, and I wish to repeat it, that in my mind the fact that these bills were issued for discount in contemplation of bankruptcy, and that the discounter knew that it was in contemplation of bankruptcy, is of extreme importance. Then he goes on: "What right had he to suppose that an utterly insolvent

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(1) 1 Ch. Div. at p. 145.

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drawer" (that is *Searby*), "a man who would do such a thing as sell bills for £200, and in a short time afterwards have a claim against him for £1700—would have kept these bills in his possession for two or three months after they were drawn, never receiving any money at all upon them, if he had had a good claim as against the acceptor?" "It appears to me," says the late Lord Justice, "that if *Jones* had not absolutely shut his eyes, there was sufficient for him to come to the conclusion, looking to the state of both these parties, that these bills were drawn for the purpose of enabling them recklessly to raise money on the eve of bankruptcy." I am entirely of the same opinion, and I think that, taking the whole of the circumstances together, particularly the fact that he knew they were issued in contemplation of bankruptcy, the fact that he calculated the price upon what he supposed would be the amount of dividend that he should receive upon the whole amount of the £1727, and that, apparently, (though the evidence is slight upon that point,) the amount of that dividend would have been about three times what he paid; taking all these things together, and seeing how very improbable it was that the bills should be discounted in the way that they were, honestly, by a person who had a right to prove against the estate, taking all these things together, I come to exactly the same conclusion that was arrived at by the Court of Appeal below, that the circumstances were such as to produce the conviction that his refraining from making farther inquiry, not necessarily of *Searby*, but of anybody about *Searby*, can be attributed to nothing else than a suspicion in his mind that something was wrong about the bills, and that if he inquired farther he would be fixed with clear and conclusive notice and knowledge that the bills were wrong, and that, therefore, he could not get a dividend upon them. Now it is proved in fact that the bills were wrong, so that if he had notice he could not get a dividend. Under these circumstances I think that the decision of the Court below was quite right, and I consequently agree in the judgment proposed.

I have only farther to add a word or two on the point that the notice of objection to the proof, given by the trustee, was not sufficient. I think, no doubt, there must be such a notice as calls the attention of the parties to the fact to be proved, so that they may be prepared to meet it, but I think that this notice was amply sufficient to shew to everybody who read it that the point to be disputed was this, was Mr. *Jones*, who took these bills, a *bonâ fide* holder for value in such a manner that he could have sued upon them if the parties had been solvent, or could prove upon them in case of bankruptcy? And the course of the evidence shews that they so understood it, and that the parties brought their proof accordingly.

LORD GORDON:—

My Lords, I quite concur in the views which have been expressed by your Lordships, and I think it very satisfactory indeed that we feel not the slightest difficulty in affirming the judgment of the Lords Justices. I think it would be a very serious thing for the commercial world if there should be any toleration of such practices as appear to have been adopted by the parties who are interested in this case.

When I looked into the case I thought the judgment appeared to be right, and the only difficulty which suggested itself arose from the fact that the learned Judge in Bankruptcy entertained a different view. But I see that the way in which he treats the subject is this: "If Mr. *Jones* could sustain an action, as no doubt he could, against the drawer and acceptor of these bills, he being the *bonâ fide* holder for valuable consideration, then he can prove upon them." Now this is an assumption which I venture to think he was scarcely justified in making. Looking to all the circumstances, I doubt very much whether *Jones* could have maintained any action on the bills. Yet the whole scheme of the first judgment is based upon that hypothesis. I also doubt very much whether, even if he could raise an action, he could prove against the estate. I think that the state of bankruptcy introduces some new elements into the consideration of such questions as these, and opens the door for an investigation into the conduct of the bankrupt and those who were conscient and confidant, as we express it in *Scotland*, with the bankrupt. Behaving, as they have behaved, and attempting, as they have attempted, to benefit by his bankruptcy, I do not think they could have been allowed the advantage they sought. Probably your Lordships would consider more carefully any suggestions of fraud on the part of those who were conscient and confidant with the bankrupt than you would consider similar suggestions with regard to third parties, or any one.

Now, in the present case, the transactions between the *Gomersalls* and *Searby* really are positively disgraceful. I am not using, I think, too strong an expression when the learned Chief Judge in Bankruptcy himself says: "I do not wonder at the impression made upon the learned Judge's mind" (that is, the County Court Judge), "when the details of all these nefarious transactions came out before him." In a case which produces the impression which this case did produce even upon the learned Chief Judge, that the transactions were nefarious, one feels anxious that Courts should not allow themselves to be run away with from the true strict law applicable to the case. I have very carefully watched this case during the argument of Mr. *Marten*, and have gone along with a great deal of what he said as to the impolicy of doing anything which would injure the negotiability of bills of exchange, which form so valuable an element in the credit of this country. But steadily keeping that in view, I venture to think that, looking at the facts of this case, we not only have here a case as between the *Gomersalls* and *Searby* of gross fraud, but that any one who had notice of the real facts ought to have made minute inquiries into all the circumstances under which he took the bills. If the Appellant took the bills from *Searby*, who was open to objection, and he had notice of the objection, it would apply to him. If he wilfully abstained from making himself cognizant of the facts, it may properly be said that if a man wilfully shuts his eyes, so as to avoid inquiring into the circumstances connected with such a history as this, the only impression which can be produced upon any unbiassed mind is, that he did so because he was afraid that if he inquired into the circumstances he would ascertain what would be equivalent to notice, destructive of any claim he might afterwards make.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 26th June, 1877.

Solicitors for the Appellant: *Rooks, Kenrick, & Co.*
Solicitors for the Respondent: *Williamson, Hill, & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
1877
July 10, 12.

PATRICK KEITH AND DAVID WYLLIE . APPELLANTS;

AND

JOHN BURROWS AND WILLIAM PERKS . RESPONDENTS.

Freight—Mortgage of Ship—Bill of Lading.

Ch. D. 14. 5

A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains the *dominus* of the ship, with regard to everything relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable.

Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount.

The owner of the ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it.

M. was the owner of sixty shares in a ship. *B.* (who acted as master) was the owner of the remaining four shares. As *B.* could not get, at *San Francisco* where he was, any employment for the ship, he determined to obtain a cargo of wheat and bring it to *England* "on ship's account." Not having money to purchase the wheat, he obtained the cargo on the credit of *P. & Co.* To them he gave bills of lading, describing the wheat as "shipped on owner's account," deliverable to the order of *P. & Co.* "at freight of 1*s.* per ton." Bills of exchange for the price of the wheat (afterwards duly accepted by *M.*) were also given to *P. & Co.* *M.*, who carried on business in *London*, had obtained from *K. & Co.*, merchants in *London*, advances of money, and, by way of security, had given them a mortgage of his shares in the ship. While the ship was on its voyage, *M.* arranged with *B. & Co.*, also of *London*, to make him advances to take up the bills of exchange; the advances were made, and, for these advances, he agreed that *B. & Co.* should receive the bills of lading, and certain policies of insurance effected by him and should sell the cargo for his account and their own. *B. & Co.* sold the cargo of wheat to third persons. The sale-note described the wheat as "at the price of 43*s.* 6*d.* per quarter of 500 lbs. shipped . . . including freight and insurance, &c. . . . Vessel to discharge afloat. Payment, cash in *London*, within seven days," &c. The last sentence of the note was, "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton of 2240 lbs. and invoice to be rendered accordingly." The invoice, made out by *M.* contained these words "6179 qrs. @ 43*s.* 6*d.* per 500 lbs." "Freight on tons 1379–7–1–3 @ 55*s.* per 2240 lbs." *M.* obtained from *B. & Co.* necessary advances, with which he took up the bills of exchange, which, with the bills of lading attached, were then handed to him. Both sets of bills were delivered to *B. & Co.* with a memorandum indorsed on the bills of lading that they were "assigned to *B. & Co.*," and "the freight assigned is at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton." The bills of lading and invoice were sent to the purchasers of the wheat. When the vessel arrived *K. & Co.*, as mortgagees of the ship, took possession of it. The purchasers of the wheat claimed delivery of it to them on payment of the freight stated in the bills of lading:—

Held, that they were entitled to the delivery of it on payment of that freight, for that the bills of lading could not, under the circumstances of the case, be altered, and that the 55*s.* per ton, introduced into the bought-note, formed part of the whole purchase-money, being a payment to be made on delivery of the cargo, and though called "freight" did not properly bear that character.

THIS was an appeal against an order of the Court of Appeal, which had reversed a previous judgment of the Common Pleas Division (1).

The action was brought by *Keith & Wyllie*, to try the right to freight on a cargo of wheat brought from *San Francisco* to *England* in the *Stonehouse*, and the facts were turned into a special case for the opinion of the Court.

The Plaintiffs were merchants in *London*, trading as *James Wyllie & Co.* The Defendants, *Burrows & Perks*, were corn factors and brokers, also carrying on business in *London*. *John Morison* was the owner of sixty out of sixty-four shares in the ship *Stonehouse*, the master, Mr. *Bley*, being the owner of the remaining four shares. On the 1st of December, 1874, *Morison* executed a mortgage of his sixty shares in favour of *Keith & Co.*, to secure a sum of £7500, which they had advanced to him, and for interest, and for any farther advances. The ship was then at *San Francisco* seeking employment. As commercial affairs there were then very much deranged, no freight could be obtained, and therefore rather than return in ballast *Bley* determined to obtain a cargo "on ship's account." Messrs. *Parrott & Co.* were merchants at *San Francisco*, and through them he obtained a cargo of wheat (described as consisting of 23,644 sacks), and the invoice stated the wheat to be shipped by *Parrott & Co.*, consigned to their order (which gave them the control of the cargo till the price should be paid), by order of *John Morison* for account and risk of whom it might concern." *Parrott & Co.* drew bills of exchange on *Morison* at sixty days' sight, to cover the price of the wheat. The bill of lading made the wheat deliverable to *Parrott & Co.*, or order, "freight payable on delivery at 1s. per ton of 2240 lbs. of gross weight delivered." The freight then current at *San Francisco* was 55*s.* per ton, but the nominal amount was inserted as the wheat was shipped as *Morison's* wheat in *Morison's* own vessel. The ship sailed from that place on the 3rd of December, 1874. The bills of exchange were accepted on the 21st of December, 1874, payable on the 22nd of February, 1875, and with bill of lading were delivered to *Parrott & Co.* On the 1st of January, 1875, *Morison* effected two policies of insurance on freight, valued, the one at £4000, and the other at £1000. The sum required to meet the bills of exchange amounted to £10,364 19*s.* 4*d.* *Morison* wanted to obtain money for this purpose, and in January, 1875, arranged with *Burrows & Co.* for the necessary advance, to secure which they were to be at liberty to sell the cargo and receive the proceeds on *Morison's* account; the bill of lading and the policies to be deposited with *Burrows & Co.* as security. Before making the advance *Burrows & Co.* searched the register at the Custom-House, but did not find any notice of any incumbrance on the vessel, nor had they any notice that *Morison's* shares therein had been mortgaged to *Keith & Co.* On the 4th of January *Burrows & Co.* advanced to *Morison* £3000, and received from him the policy for £4000. On the 2nd of February, 1875, he executed in favour of *Keith & Co.* a second mortgage of his shares in the ship to secure £4000 and farther advances.

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(1) 1 C. P. D. 722 (where the facts are fully detailed); 2 C. P. D. 163.

On the 19th of February, *Burrows & Co.* on behalf of *Morison* and of themselves, sold the cargo to Messrs. *Jump*, of *Liverpool.* The bought note contained the following statements:—"Bought of *J. Morison*, through Messrs. *Burrows & Perks*, for *Henry Jump & Sons, Liverpool*, a cargo of Californian wheat, fair average quality of the season's shipments when shipped; shipped per *Stonehouse*, first class, from *San Francisco.* Bill of lading dated about 2nd December, 1874, say 23,644 bags containing 3,089,775 lbs., at the price of 43*s.* 6*d.* per quarter of 500 lbs. shipped; bags weighed and paid for as wheat; including freight and insurance, to any safe port in the *United Kingdom*, &c. . . . . no charge for demurrage or bags . . . . Payment, cash, in *London*, within seven days . . . . in exchange for bill of lading, and policies of insurance (free of war risk), effected with approved underwriters, but for whose solvency sellers are not responsible. Invoice quantity is to be final." Then followed some other terms as to money allowances, not necessary to be mentioned, and the bought note concluded thus: "As cargo is coming on ship's account, freight is to be computed at 55*s*. per ton of 2240 lbs., and invoice to be rendered accordingly." The case stated that *Burrows & Co.* would have had a difficulty in disposing of the cargo without allowing amount equivalent to freight to remain unpaid till the vessel's arrival; and would not have obtained so large a price for it. *Morison* made out an invoice in accordance with the above bought note; it was in these terms:—"Invoice of wheat per *Stonehouse*, at *San Francisco*, sold to Messrs. *Henry Jump & Sons, Liverpool*, as per contract of 19th February, 1875.

" 23,644 sacks wheat at 43/6 per 500 lbs. .	£13,440	10	5
Freight in tons 1379 : 7 : 1 : 3—55/ per 2440 lbs.	3,793	5	0
	£9647	5	5
Brokerage, ½ %	67	4	0
	£9580	1	5
Interest from 26 Feb. to 19 April, 52 days at 5%	68	4	10
	£9511	16	7"

On the 22nd of February, *Morison* obtained from *Burrows & Co.* an advance of £9000, which, with the previous sum, made up their advances to £12,000, and with these sums he paid the bills of exchange given for the purchase of the wheat, and on such payment received the bill of lading and the bills of exchange attached thereto, which, on the next day he handed to *Burrows & Co.*, and indorsed the following memorandum on the bill of lading:—" We assign our interest in the within freight to Messrs.

Burrows & Perks, London, whose receipt, or that of their appointed agent, will be sufficient discharge. The freight assigned is at the rate of 55/ per ton, and not the nominal amount of 1s per ton.

"*J. Morison & Co.* 24/2/75."

At the same time he wrote to *Burrows & Co.* the following note:—"We farther give you in security policy of insurance on wheat £1500, and on freights £1000, both in the *Stonehouse*. Should this vessel be lost, we trust you will give us the collection on them as well as on the former policies. *J. Morison & Co.*"

The invoice was forwarded to Messrs. *Jump*, who paid the balance, £9511 16*s.* 7*d.*, and shortly afterwards sold their interest in the cargo to *Ross & Co.* of *Liverpool*.

On the 2nd of March, *Morison* mortgaged his interest in the ship to *Joseph Harrold*, to secure a sum of £800 then advanced to him. *Harrold* registered his mortgage on the next day, the 3rd of March, and thus stood in the position of first mortgagee. *Keith & Co.* did not register their mortgages till the 6th of March.

The ship arrived on the 13th of April at *Falmouth*, for orders, and was taken possession of by *Harrold* and by *Keith & Co.*, as mortgagees. *Harrold's* claim being fully covered by the ship he laid no claim to the freight. The ship arrived at *Liverpool* on the 19th of April. The market was then falling. The freight at 55*s.* per ton was claimed by *Keith & Co.*, as the mortgagees of the ship. *Burrows & Co.* insisted that it belonged to them under the assignment made to them.

By an agreement between the respective parties, made in order to prevent delay and loss, the sum in dispute was paid into the *London and Westminster Bank* to abide the event of the action.

The Court of Common Pleas gave judgment for the Plaintiffs (1); on appeal, that judgment was reversed (2). This appeal was then brought.

Mr. *C. S. C. Bowen* (Mr. *Herschell*, Q.C., was with him), for the Appellants, the mortgagees:—

The owner of a ship is entitled to freight from any person whose goods he has carried in his ship. The mortgagee of a ship

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(1) 1 C. P. D. 722.

(2) 2 C. P. D. 164.

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stands precisely in the same situation as the owner: *Camden* v. *Anderson* (1), where Lord *Kenyon* said (2), "The right to freight results from the right of ownership." *Morrison* v. *Parsons* (3) proceeded on that principle. On that principle, too, the insurer, on becoming the abandonee of a vessel, is entitled to the same rights as the original owner, and can claim the freight: *Davidson* v. *Case* (4); freight being an incident to the ship: *Stewart* v. *The Greenock Marine Insurance Company* (5); *The Scottish Marine Insurance Company* v. *Turner* (6). The value of the goods is enhanced by the service of carrying them, and therefore the person who performs that service is always entitled to compensation: *Miller* v. *Woodfall*, per Lord *Campbell* (7). In that case there was no freight at all declared to be payable, the goods were from beginning to end the goods of the shipowner, and that case may, therefore, be taken as establishing the principle of liability to freight, or payment in the nature of freight, for service rendered. If the goods at the commencement of the voyage belong to the shipowner he will not, perhaps, in point of form insert in the bill of lading the amount of the freight, for he would not go through the ceremony of paying himself, though, if he conducts his business properly, he will, as Lord *Colonsay* observed in *Weguelin* v. *Cellier* (8) enter the freight on one side to the credit of the vessel, and on the other debit the cargo with the freight. The mortgagee when he takes possession under his mortgage has a right to treat the ship as earning a substantial freight, and though the shipowner, while the goods were his own, charged no freight against them, they become liable to freight the moment he consigns them to third persons. *Gumm* v. *Tyrie* (9) abundantly confirms that proposition. [LORD PENZANCE:—In all the cases where a contract for freight exists the only question is, who, under the various circumstances of those cases, is entitled to the freight.] There is a contract here. If none had existed while the wheat was the property of the shipowner, it arose when he parted with property in the wheat, and was declared in the bought note. [LORD BLACKBURN :—The contract was in the bill of lading, and there the freight is stated at 1*s*. per ton.]

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(1) 5 T. R. 709.
(2) At p. 711.
(3) 2 Taunt. 407.
(4) 5 M. & S. 79; 2 Br. & Bi. 379; 5 B. Moo. 116.
(5) 2 H. L. C. 159.
(6) 1 Macq. Sc. App. Cas. 334. 17 Jur. 631
(7) 8 El. & Bl. 493, at pp. 504–505.
(8) Law Rep. 6 H. L. 286, at p. 301.
(9) 4 Best & S. 680; 33 L. J. (Q.B.) 97; affirmed, 6 Best & S. 298; 34 L. J. (Q.B.) 124.

(7) S.C. 4 Jur. N.S. 302.

The case of *Brown* v. *North* (1) is not, when rightly considered, adverse to the Appellants. No freight was payable there; but then the cargo continued all the time the property of the shipowner, and no change was made by him in its original character. Here a change was made, and made by him while he possessed full authority to make it. While the shipowner was still the owner both of ship and cargo, he assigned by a written paper, dated the 24th of February 1875, the freight, as freight, to *Burrows & Perks*, declaring in the written paper, "The freight assigned is at the rate of 55/ per ton, and not the nominal amount of 1/ per ton." And in the same manner the bought note itself made by *Burrows & Perks* on the sale by them of the wheat to *Jump & Co.* contained the words: "As cargo is coming on ship's account freight is to be computed at 55/ per ton." *Burrows & Perks* had therefore ample notice that the freight was to be at a real and not a nominal amount, and conducted their dealings on the sale of the cargo with that knowledge. They were now incapable of denying what they themselves had done.

Mr. *R. E. Webster* (Mr. *Thesiger*, Q.C., was with him):—

It is not denied as a general proposition that the owner of a ship is entitled to freight for goods carried in his ship, and that a mortgagee taking possession before the goods are delivered stands in exactly the position of the owner, and like him is entitled to the freight. It is distinctly so stated by Lord Justice *Wood* in *Brown* v. *Tanner* (2). But the circumstances here render that general doctrine entirely inapplicable. The owner has a right to carry his own goods in his own vessel without paying any freight, *Alexander* v. *Simms* (3); *The Mercantile Bank* v. *Gladstone* (4), or to state in the bill of lading a freight which is purely nominal, and the mortgagee, merely because he is mortgagee, cannot claim freight against the owner. If the owner so states it and then sells the cargo and hands over the bill of lading, he cannot afterwards charge a new and different sum for freight. He is bound by the statement of the freight in the bill of lading. Nor can his mortgagee in that respect stand in a different situation from himself, and, upon the general doctrine that freight is chargeable on goods carried, or on the pretence that the value of the goods has thereby been increased, alter the amount from that stated in the bill of lading, whatever that amount may be. If he could do that a bill of lading would be a valueless instrument. *Brown* v. *North* (1) is a distinct authority to shew that the terms, whatever they were, stated in the bill of lading must be observed. And there the bills of lading said—"no freight being owner's property," or "on owner's account." In *Gumm* v. *Tyrie* (2) there was an express stipulation for payment of freight, though no particular freight was named, and the mortgagee was held entitled to freight because the owners would have been entitled to it had there been no mortgage. So would the shipowner here, but the amount was settled; it was fixed at 1*s.* per ton. In *Miller* v. *Woodfall* (3) the claim for freight, as freight, was expressly negatived, but a compensation was allowed for the service performed by the insurers in bringing the goods from *Southport* to *Liverpool*, and, for convenience sake, that compensation was calculated at the rate which would have been payable as freight for carrying the goods such a distance. But that was a kind of *quantum meruit* and did not affect any rights previously existing. The sale of the cargo here was effected on terms —what terms?—those to be found in the bill of lading, namely, a freight of 1*s.* per ton. As Lord Justice *Mellish* said (4): "I am clear that the mortgagees have no right to what they contend is 'accruing freight' unless they can find, in existence at the time when they take possession, a contract by which freight was to be paid to the mortgagor." The only contract here was that which declared the freight to be 1*s.* per ton. And the Court below rightly held that the words introduced into the assignment of the freight and into the brought note did not alter the bill of lading and create a new freight, but only related to the form and the

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(1) 8 Ex. 1.

(2) Law Rep. 3 Ch. 597, at p. 602.

(3) 5 D. M. & G. 57.

(4) Law Rep. 3 Ex. 233.

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(1) 8 Ex. 1.

(2) 4 Best & S. 680; 33 L. J. (Q.B.) 97; affirmed, 6 Best & S. 298; 34 L. J. (Q.B.) 124.

(3) 8 El. & Bl. 493.

(4) 2 C. P. D. at p. 166.

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periods in which the two sets of payments by the purchasers for the cargo and for the delivery of it, were to be made.

Mr. *Bowen* replied :—

No authority had gone farther than this; that the holder of a bill of lading had a right to receive the goods, but only on the payment of freight. Here he refused to pay freight because the owner of the ship had originally shipped the goods on his own account, and consequently no freight was payable from him to himself. But here the holder of the bill of lading was a third person, who had purchased the goods under a bought note afterwards made, and made while the owner had full authority to make it, and which stated a substantial and not a nominal freight, and so the purchaser became liable to pay the substantial freight. Having made the agreement, he could not now deny it. At all events he was bound to pay to the mortgagee that portion of the freight which accrued due in respect of the carriage of the goods after the mortgagee had taken possession.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, in this case your Lordships have heard from the learned counsel for the Appellants, Mr. *Bowen*, an extremely able and ingenious argument, and certainly everything has been said by him which could be said in support of the propositions for which the Appellants contend. But notwithstanding, I do not think that, now that this case is properly understood, there is any doubt in any of your Lordships' minds as to what decision should be arrived at.

I should say at the outset that there is an apparent conflict, but it seems to me to be nothing more than an apparent conflict, in the decisions of the Courts below. It is quite true that the Common Pleas Division decided in favour of the Appellants, and that decision was reversed by the unanimous decision of the Court of Appeal. But as I read what took place in the Common Pleas Division the great stress of the arguments went upon, and the attention of the Court was occupied with, not the question which has been argued now, but another question which might arise in the case with reference to the effect of the Ship Registry Acts. The particular question which has now been argued at your Lordships' Bar was disposed of in the Court of Common Pleas in a very few sentences, and in a way which seems to me to shew—indeed I think that was admitted at the Bar—that this point was not fully developed in argument before the Common Pleas Division.

Now, my Lords, the question arises with regard to the rights of the mortgagee of a ship taking possession, both generally and also under the circumstances of this particular case. My Lords, with regard to the general rights as between mortgagor and mortgagee of a ship there cannot, I think, at this time of day be any real controversy. The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit. Those goods which are brought home for him, he may sell at their full market price when they arrive in this country, thereby, of course, bringing into his own pocket not merely the original value of the goods, but also the portion of remuneration which represents the value of the carriage of those goods from abroad. Or, again, he may, in making through his master a contract for freight at a foreign port, attach to the carriage of the goods a rate of freight which may either be nominal or may be very far under the ordinary rate of freight of the market. All those acts would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor.

My Lords, all these propositions are beyond dispute, and indeed were not denied in the argument at the Bar. And, farther, it was not denied that in the present case, where, upon the shipment of the goods at *San Francisco*, there was inserted in the bills of lading a rate of freight of 1*s.* a ton, which was merely nominal, the owner, or the master on the part of the owner, had a right to insert that sum in the bills of lading; and moreover that if those bills of lading had been passed over to third parties, these third parties when the ship arrived in this country and was taken possession of by the mortgagee, might have come with those bills of lading and, on payment, or tender, of a sum representing the nominal amount of freight, might have taken possession of, and would have been entitled to have delivered over to them, the goods in question. It was also not denied that, if nothing more had happened, and if the owner of this ship himself had come, the mortgagee having taken possession, and had asked for those goods to be delivered to him, paying the mortgagee in possession the nominal sum for the freight, he also would have been entitled to receive the goods.

My Lords, in point of fact when a mortgagee takes possession he becomes the master or owner of the ship, and his position is simply this: from that time everything which represents the earnings of the ship which had not been paid before, must be paid to the person who then is the owner, who is in possession. The owner then in possession happens to be the mortgagee, and it is in consequence of his filling that position, and not by virtue of any contract or any antecedent right, that he becomes the person entitled to receive the freight. But that right again is itself checked by another consideration. All that he can receive is that which the ship was in the course of earning, either by way of express contract, or, which is the same thing, by carrying goods upon a *quantum meruit.*

My Lords, I pass therefore from all those questions, which, as the argument developed itself, turned out not to be really disputed, and I come to that which was the only real controversy in the case. It is said on behalf of the Appellants that, although originally the bills of lading were given for this nominal freight, and might properly be given for it, and if nothing more had been done, upon the payment of that freight the goods must have been delivered up, something more was done, and a different state of things arose whilst the ship was on the voyage and when it was on the point of arriving in this country. Now, my Lords, what happened was this. Bills of exchange had been drawn at *San Francisco* representing the value of the goods which had been put on board. Those bills of exchange had been sent over to this country with the bills of lading attached, and were maturing. In order to get possession of the bills of lading it became necessary for Mr. *Morison*, who was the owner of the ship, and in whose interest the goods had been put on board, to provide for the payment of the bills of exchange a sum of upwards of £10,000. He could not do that with his own money, and he made an arrangement with the Respondents that they were to provide the money, and that the goods were to be realised in the common interest both of *Morison*, the owner of the ship and the goods, and of the Respondents, who were providing him with this money to take up these bills of exchange, together with some farther sum, making the advance altogether, I think, about £12,000.

My Lords, the sale of the goods was put into the hands of the Respondents, and the goods were sold by them to persons of the name of *Jump* of *Liverpool*, and it is upon the wording of the documents which then passed, that the difficulty of the case, if it be a difficulty, has arisen, at all events that the ground for the argument of the Appellants has arisen. Now I must say with regard to the documents that they are not, as it seems to me, very happily expressed; but when they are carefully looked at, I do not think there can be the least doubt as to what was intended by the parties. The documents are three in number, and although they are of different dates, running from the 19th to the 24th of February, it is quite clear—indeed the statements in the case go to that extent—that the three documents are all to be taken together; they form part of one and the same transaction, and it is impossible to estimate properly the exact character of the transaction unless the documents are looked at.

My Lords, I do not at all propose to read the first document at length, for it has been very recently read to your Lordships. It is, in the greater part of it, an ordinary contract of sale on the cost, freight, and insurance terms, and in the centre or early part of the contract we have the words "including freight." But inasmuch as the last clause of the contract expands this word "freight," and puts a meaning upon what is intended by the word "freight" in the centre, your Lordships must read the contract as if the glossary, the interpretation of the term "freight" given at the end, had been read into the centre of the contract, Now, the glossary or interpretation which is given of the term "freight" at the end of the contract explains very clearly what the parties meant when they used it in the centre of the contract. We must bear in mind that which, obviously, was made known at the time to the parties, as to what was in the bills of lading. The clause at the end is this, "As cargo is coming on ship's account freight is to be computed at 55*s.* per ton. of 2240 lbs., and invoice to be rendered accordingly." That expression is not very correctly put, but it obviously means this; it amounts to a statement that the cargo was coming on the ship's account, and there is implied, what of course the parties knew by the bills of lading, that in the bills of lading the rate of freight was nominal merely, but that which is upon the bills of lading is corrected for the purpose of reckoning or computation, and there is virtually this statement; although in the bills of lading, although in the contract of the freight, you will find a nominal sum was set down as "freight," that was not what we meant when we used in the centre of this contract the words "including freight," but what we meant was a different and a larger sum, namely, 55*s.* a ton, that sum is to be entered for the purpose of computation as if it was freight, not because it is freight, for it is not freight, but for the purpose of computation, in order that there may be that deduction made from the whole price, and in order that the payment of that sum may not be made immediately, or within seven days, as the rest of the price is to be paid; and that (says the contract) is to be done in the invoice which is to be delivered.

Accordingly, when you proceed to the next step, and look at the invoice, you find that that is exactly what is done. The estimate or computation is made of the whole price at 43*s.* 6*d.* per quarter, that amounts to £13,440 10*s.* 5*d.* Then a deduction is made by way of computation of the freight on so many tons at 55*s.* per ton, that deduction amounts to £3793 5*s.*, and then there are the usual reckonings of brokerage and so on. The result is that there is to be a payment made in cash on the 26th of February of £9511 16*s.* 7*d.*

Then, my Lords, we have this statement with regard to the third document. "On the 23rd of February, 1875, in pursuance of such last-mentioned arrangement" as part of the same transaction, *Morison* hands over, along with the bills of exchange, the three bills of lading, containing a nominal sum for freight to the Defendants, and this memorandum is endorsed on the bills of lading and signed by Mr. *Morison.* "We assign our interest in the within freight" (that is the freight as it stood in the bills of lading) "to Messrs. *Burrows & Perks* of *London*" (the Respondents) "whose receipt or that of their appointed agent will be sufficient discharge. The freight assigned is at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton." Now was this meant and intended, because it was admitted that the argument of the Appellants must go to this, was this intended to be a cancellation of the original contract of the freight at the rate of 1*s.* a ton and a substitution of a new contract for freight by which Mr. *Morison*, the shipowner, was engaging to carry the goods at a higher rate of freight, and the person who had sold the goods, or who was representing the owner of the goods, was content to admit an obligation to pay freight at the rate of 55*s.* a ton? My Lords, I cannot find that there is anything whatever in this document which indicates any intention of that kind. It appears to me simply to be a supplement, the necessary supplement, of the arrangement which had been made by the two other documents which I have mentioned.

It appears to me that the result of the whole was, as it was held by the Court below to be, a division of one entire sum by way of purchase-money for these goods into two parts (as the case finds it was, the facile and easy way of arranging the matter) the one to be paid immediately, that is to say within seven days, the other to be computed as freight (but not really to be freight) and to be paid at the time at which freight would have been payable, but when paid to be paid really as part of the price of the goods. My Lords, there was not, as it seems to me, any intention in the minds of the parties to change, and there was not any act which amounted to a change of the contract for the freight between the shipowner and any person who might be entitled to the goods; and therefore when the mortgagee takes possession it appears to me that he can find nothing and claim nothing, under any of those documents, which can give him a title to a greater amount of freight than was originally mentioned in the bills of lading.

My Lords, upon these grounds I submit to your Lordships that the decision,—the unanimous decision,—of the Court of Appeal is correct, and that this appeal should be dismissed with costs.

LORD PENZANCE:—

My Lords, I must say that this case has been very ably argued indeed on both sides. When the case was first presented to your Lordships it appeared to me to be placed by the learned counsel for the Appellants upon a very broad and simple ground, and it was rested upon an argument of a very interesting character, namely upon this ground, that where goods are shipped on behalf of the owners of the ship and, either no freight is made payable by the bill of lading, or a merely nominal freight is made payable on that account, and where, before the vessel has discharged the cargo a mortgagee of the ship has taken possession of the ship, he is entitled to look, in the abstract, upon the earnings of the ship as his property, as something payable to him, and although there should be no real contract for the payment of anything in respect of these goods, they being the goods of the owner of the ship, yet that the fact of the ship having carried them and thereby—looking at the matter in the abstract—having increased the value of the goods, and having thus earned a something for carrying them,—is sufficient to create in the mortgagee a right to receive a sum proportionate to the benefit derived. There is no doubt that where goods are shipped on board of a vessel under those circumstances, they derive an additional value by being carried; and although no freight is reserved by the bill of lading, yet when the goods arrive, the shipowner receives in the increased value of the goods something which to him represents precisely the same thing as if he had been carrying somebody else's goods, and he had paid him a definite sum for the carriage of them. There is no doubt that that is in the abstract a state of things in which the ship is earning something, but the question is whether that state of things alone has ever yet been held to give to a mortgagee a right to claim a freight.

Now, my Lords, upon that subject I think the authorities which have been produced are entirely against any such notion. Several authorities have been cited, which I will not trouble the House with at any length. There was the case of *Brown* v. *North* (1), and there was the case of *Miller* v. *Woodfall* (2), which seem to me to have directly raised the sort of question that I am now asking your Lordships to consider. In *Miller* v. *Woodfall* goods had been shipped on the owner's account, the vessel had been abandoned, the property in the vessel had therefore passed to the abandonee, and the abandonee claimed to have the benefit of the earnings of the vessel, although no freight had been reserved by contract; but the language of Lord *Campbell* in giving judgment in that case, which was read to your Lordships, was distinctly antagonistic to any such claim upon principle. There was another case which illustrated the same matter. Neither of these cases it is true, is the case of a mortgagee, but I apprehend that the principle is precisely the same. The other case was the case of *The Mercantile Bank* v. *Gladstone* (3), in which the same question arose with regard to a vendee, and in like manner the claim to the earnings of the ship, as distinct from the earnings as regulated by a contract to pay something, was repudiated by the Court. Under those circumstances I think that the argument on behalf of the Appellants, so far as it is based upon any such general right as that to which I have alluded, must fail.

But then the learned counsel for the Appellants, more particularly in reply, has fallen back upon that which no doubt is a point well worthy of your Lordships' consideration. He says: For the moment passing from my first ground, I will assume that the mortgagee is not entitled on taking possession of the vessel to any freight other than that which has been contracted to be paid, but (he says) the circumstances of this case shew this state of things, that originally a very small sum, namely, 1s. per ton, was contracted to be paid, but that afterwards, and whilst the vessel was still on its voyage, the shipowner and the person who was entitled to the goods, by a bargain made between them, agreed to vary the original contract of 1*s.* a ton, and to create a fresh and a new contract for a much larger sum, namely, 55*s.* a ton. That is the way in which the learned counsel put it, and if the facts of the case supported it, it would seem to me that the law would be in his favour.

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(1) 8 Ex. 1.

(2) 8 El. & Bl. 493. 4 Jur NS. 302

(3) Law Rep. 3 Ex. 233.

The only question, therefore, my Lords, is whether the facts of the case do support this contention; and really the whole matter, now that it is thoroughly understood, appears to me to turn on one of the three documents to which my noble and learned friend the Lord Chancellor has adverted. The document of the 19th of February is one of the three documents which represented the transaction. The Defendants had agreed with Mr. *Morison* to make to him the necessary advances to enable him to take up the bills of exchange, and a part of the bargain was that they should be at liberty, in truth, in order to put themselves in funds, and to secure themselves, to sell the goods as a part of the arrangement on which they were to make these advances. Accordingly on the 19th of February (on their own account, to the extent of their advances, and on the account of *Morison* to the extent of the rest), they did sell. They sold the cargo to Messrs. *Jump*, and the bargain, down to the last paragraph of the written contract, was an ordinary bargain for the sale of a floating cargo, cost, freight, and insurance. It is not denied by the learned counsel for the Appellants that, had it not been for the last paragraph of the written documents, what would have happened would have been this,—the purchasers would have been bound to pay the complete sum of 43*s.* 6*d.* a quarter, holding back in their hands sufficient to discharge the freight which the shipowner would naturally be entitled to demand of them when the cargo arrived. That would be the natural effect of a contract such as this apart from the concluding paragraph.

But at the end of the contract come these words: "As cargo is coming on ship's account freight is to be computed at 55*s.*" "per ton of 2240 lbs., and invoice to be rendered accordingly." Now, I think every one will agree that the obvious reason of that was this: A round sum was to be paid for the goods, that round sum would represent the original value of the goods *plus* the value that the goods would be worth on arrival at the port of discharge; in other words the original value of the goods *plus* the cost of carrying them. That was the nature of the bargain, and it is obvious enough that if the goods did not arrive, and if the purchaser were to pay the whole value of the goods so computed, he would be paying for the cost of carrying them, although in truth they had never been carried, and therefore it is quite natural that a sum should be kept back which would represent the cost of carriage, and for that purpose it was, as it seems to me, that this clause was introduced.

Well, my Lords, but Mr. *Bowen* says, Yes that may be very true, but the language which they have used shews that what was intended was, not merely that a sum should be kept back to represent the carriage of the goods, but that a new bargain should be made that the carriage of the goods should be paid for at that price. Whether he is right or not in that is just the question, and I think it all turns upon the language used. Now, the language used is not that the freight is to be altered from 1*s.* a ton to 55*s.*, and the bill of lading amended accordingly. It would have been quite competent to them to do that, because Messrs. *Jump* were to be the purchasers of the goods and were to have the bills of lading, and Mr. *Morison* was the owner of the ship, and no doubt between them they might have arranged that the old freight of 1*s.* a ton should be withdrawn, and that a new freight of 55*s.* a ton should be paid, and they might have agreed to alter the bill of lading to that effect. Instead of that all that they say is this: "The freight is to be computed at 55*s.*" "per ton of 2240 lbs., and invoice to be rendered accordingly." I think that language points much more naturally to this: As a matter of account, and in order to express and explain what it is that the purchaser is to be entitled to hold back, we will take the sum of 55*s.* a ton as representing the sum which he is to be entitled to hold back, which for that purpose we will call freight. It seems to me that that is the natural meaning of the document. That being so there was no alteration whatever of the bill of lading, or of the contract which the bill of lading contained. Therefore, my Lords, the claim of the mortgagee falls to the ground, and I should advise your Lordships to reject this appeal with costs.

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LORD O'HAGAN:—

My Lords, I am of the same opinion. Your Lordships may affirm the judgment of the Lords Justices without more than an almost formal conflict with the Court of Common Pleas, for I observe that the real ground of your decision was scarcely brought under the consideration of the learned Judges of that Court.

The course of the very able argument before your Lordships has varied much, but it has been brought, I think, to a narrow issue.

Although we had an ingenious controversy upon the point, it seems to me established beyond dispute, and almost too clearly for argument, that the shipowner may, for his own interest, and at his own discretion, procure a cargo for his ship's account, and make the voyage unfruitful of profit, in the way of freight, so as to take from a mortgagee any benefit by reason of such profit. Chief Justice *Cockburn* puts this succinctly in *Gumm* v. *Tyrie* (1): "When goods are shipped on account of the owners of a vessel, no question about freight can arise; and a mortgagee, if he takes possession under the mortgage, cannot claim freight in respect of the cargo conveyed in the vessel on account of the owners." The proposition which was urged so strongly, that in such circumstances the mortgagee might claim on account of the work of the ship enhancing, by transit, the value of the cargo, is not sustainable. It is supported by no authority, and can, in no way, avail the Appellants.

What was done, in this matter, the special case makes very clear. This is the statement of its fourth paragraph: "The *Stonehouse* was at *San Francisco* seeking employment, and the freight market being disorganised owing to a recent commercial failure, her captain, Mr. *Bley*, determined, rather than accept the low offers of freight which were being made in the thick of the crisis, to load a cargo of wheat on account of the ship, hoping by its sale in *England* to realise a better margin than what was available as freight at the port of loading." The cargo was shipped for the benefit of the owner, and without any view to the earning of freight. The captain had made efforts in that direction, but he could get no desirable offer; and he accepted the wheat as likely to produce a better profit from its sale in *England*. The amount of freight mentioned in the bill of lading was merely nominal, and inserted for reasons which have been fully explained. What, in such circumstances, was the position of the mortgagee? The cases make it clear that he had his claim, not only upon the vessel, but upon any benefits or advantages which were in process of accrual when his mortgage was executed. If there had been a contract for freight he would, properly, have claimed the profit of it. But there was none. There were no parties by whom such a contract could have been made; and though the bill of lading gave a right to the shilling which it specified, it gave no right to anything more. The captain had taken the cargo substantially freight free, and the mere fact that it was carried in the vessel, in the absence of any contract, did not create a farther liability. The bill of lading had fixed the relations of the parties, and the mortgagee was bound by its terms. The dealings of third persons did not give him rights which otherwise he could not have asserted. No freight, save the shilling, was accruing, or to accrue, when his interest in the ship was created. The matter is pointedly put by Lord Justice *Bramwell:* "Now suppose these bills had been dishonoured, what freight would then have been payable? Suppose the Defendants had not advanced the money to take them up, though the contract for sale had been made. The shippers' freight agent in that case would have been only held liable for one shilling; and why should the Defendants be held liable for more?" The use of the word "freight" has originated this difficulty. But that word in its collocation did not create a contract of affreightment giving any new claims to the mortgagee. The "computation" for mercantile purposes was to be at 55*s.*, but the contract remained a contract of sale.

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(1) 4 Best & S. 680, at p. 703; 33 L. J. (Q.B.) 97.

The case has been already so fully dealt with by my noble and learned friends that I shall add nothing farther. I advise your Lordships to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I understood certainly, at the beginning of the argument, and all through Mr. *Bowen's* argument when he was speaking the other day in support of the appeal, the point that was argued to be entirely the one to which my noble and learned friend, Lord *Penzance,* first alluded, namely, whether or no there was a right to apportion upon a *quantum meruit* the remuneration for the use which had been made of the ship on its voyage in bringing home the cargo which had been shipped under the terms of 1*s.* a ton freight, obviously a nominal freight.

Now, my Lords, upon that point I think the matter is perfectly concluded by authority. It has been always held that where a ship has been sold and transferred in the course of a voyage, or where it has been transferred by operation of law, which would be the effect of an abandonment accepted by the underwriters, or a recovery of a total loss, which would amount to a transfer from the time when the loss occurred, in such cases the transferee of the ship takes all the benefits to be got from the completion of the voyage. So far as that goes I think that there is no difference between the law of this country and that of any other country; and I think that would obviously be good and intelligible justice and common sense. But it has been established, in this country at least, that where there is a voyage pending, and there has been a contract made under which a certain sum is to be payable if the voyage is completed, whether it be freight or whether it be charter money would not matter, nothing would be earned unless the voyage were completed, and all would be earned if the voyage were completed. Then, inasmuch as the fag end of the voyage, as we may call it, is performed by the ship after the ship has become the property of the transferee, one would be inclined to say that there should be, in justice and common sense, an apportionment of the earnings. It might be practically very inconvenient to apportion them, but that should in justice be done; however, that is not the law of *England* according to the authorities from *Davidson* v. *Case* (1) downwards.

The case in which it has most distinctly arisen is a case where there has been a transfer of a ship during its voyage in consequence of a total loss being recovered from the underwriters, which has the effect of transferring the ship to the underwriters

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(1) 5 M. & S. 79; 2 Br. & Bi. 379.

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from the moment of that total loss. The case of *Davidson* v. *Case* (1) was the first of the kind, but the last case, which was the strongest, was a case which has been mentioned, namely, *Stewart* v. *Greenock Marine Insurance Company* (2), in this House. In that case the ship having sustained no damage on the voyage home, arrived at the mouth of the harbour of *Liverpool*, and when about 100 yards from the dock, and going into dock, with the cargo on board, struck on the edge of the dock, and sustained such injuries as resulted in becoming a total loss. The ship was destroyed in fact, although it was afterwards able to get into the dock, and the goods were delivered in *Liverpool*. That 100 yards or so from the harbour into the dock, which was all that was necessary to complete the earning of the freight, was done by the ship after the accident, which ultimately made a total loss accrue to the underwriters, and it was decided in this House, and decided upon authorities which certainly settled the point, that, as that distance of 100 yards was performed by the ship after the loss occurred which made it the ship of the underwriters, the underwriters were entitled to take the whole freight; and they did get it. It was very hard on the shipowner, because, although he was insured for freight, he did not recover from his underwriters upon freight, inasmuch as the freight had never been lost. It was lost to him, but it was not lost to the underwriters, because he had sold his ship to the underwriters as a total loss. It was cruelly hard upon him; but that case settled the point that you do not apportion freight. In *Miller* v. *Woodfall* (3) I made a desperate attempt to say that the English law was different, but I could not persuade the Court of Queen's Bench to say that the law differed from that which had been laid down in other cases, harsh as that law is; I take it that it is quite clearly settled.

Mr. *Bowen's* argument, as I understood it on Tuesday, was that it ought not to be so, that, inasmuch as this mortgaged ship was taken possession of by the mortgagee when it came to *Falmouth*, having carried the goods from *San Francisco* to *Falmouth*, and then went on from *Falmouth* to *Liverpool* after the mortgagee had taken possession, the circumstance of the mortgagee taking possession makes the difference, and inasmuch as he is taken to have carried the goods on to *Liverpool*, he is not simply entitled to take an apportionment of so much as might be his share upon a *quantum meruit* for carrying the goods on from *Falmouth* (there would be some shew of justice in that), but entitled to take the whole of the earnings of the ship from the time it started from *San Francisco*, without any contract. I take it, my Lords, that that is not the law at all. In the present case it would obviously not be so, for the shippers of the cargo, Messrs. *Parrott & Co.*, had stipulated, for their security, that if the bills of exchange were not paid the goods, when delivered in *England*, were to be delivered to them, subject only to a nominal freight of 1*s.* a ton. They had made an arrangement of this kind: If we take the goods, which we are entitled to do if the bills are dishonoured, we shall pay £69 17*s.*, and no more, and then we shall have the goods, which will be a sufficient security for us, because they will be goods carried to *England*, and no doubt enhanced thereby in value much more than £70. That was the security they had stipulated for; and if the bills of exchange had been dishonoured, and *Parrott & Co.* had taken possession of the goods, it would obviously have been monstrous to say that, because the mortgagee had intervened and taken possession of the ship before the voyage was ended, though *Parrott & Co.* had made their bargain with the mortgagor at the time he was in possession, and when he had a perfect right to make the bargain, the mortgagee could claim from *Parrott & Co.* more than they and he had agreed to. But even if it had been a shipment originally by the mortgagor himself, without the intervention of *Parrott & Co.*, if he had paid for the goods in *San Francisco* with his own money, and put them on board, I take it that it would be clear there would not be here any new implied contract, by reason of the mortgagee taking possession, altering the contract under which the goods were originally shipped. They were shipped in *San Francisco* to be carried without any but the nominal freight, and the taking possession by the mortgagee would not create a contract for freight, or, if it did, it would create a contract only for freight *pro ratâ*, upon a *quantum meruit*, from the time of the mortgagee taking possession, which in the present case would be at *Falmouth*. But the authorities shew, and I think *Miller* v. *Woodfall* (1) is as good an authority as can be cited for that purpose, that it does not do so. When the mortgagor's own property is on board, and consequently there is nothing to be paid for freight, the fact of the mortgagee taking possession does not create a contract to pay freight which would entitle him to take it.

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(1) 5 M. & S. 79; 2 Br. & Bi. 379.
(2) 2 H. L. C. 159.
(3) 8 El. & Bl. 493. 4 Jur NS. 302.

But, my Lords, passing from that, in the reply to-day Mr. *Bowen* has argued with great ability in favour of what certainly seems to be the view (I agree a hasty view) taken by the Judges in the Common Pleas Division when the case was before them. They say (2) that although the freight originally was only nominal, "yet in the contract with *Jump & Co.* the freight payable is agreed to be 55*s.* a ton, so the freight assigned to the Defendants was likewise freight at 55*s.* The Defendants therefore, whether they claim as for *Jump & Co.*, or under the assignments to themselves, are not in a position to deny that the sum payable as and for freight was to be 55*s.* per ton." Now my Lords, that is putting it on a ground of estoppel. Mr. *Bowen* did not argue upon the ground of estoppel the other day, and how anything which passed between *Jump & Co.* and the Defendants could operate as an estoppel for the mortgagee who was no party to it, and of whom they had never heard, it is difficult to conceive.

Mr. *Bowen* does not say that it operates by way of estoppel, but that it really was a contract altering the freight. Doubtless it would be quite possible to make such a contract when the goods were coming from *San Francisco*, and were in the ship belonging to *Morison*. *Morison*, if he had paid off *Parrott & Co.*, who held the bills of lading, and had himself become able to do entirely what he liked with the goods, might have made a bargain with a third person. If he had liked, he might then have said: The goods are coming in my own vessel, and I am free if I like now to send them to any place, or (if the goods are not insured) burn them or throw them overboard; I now therefore make a contract with you by which I bind myself to carry them on to their destination on your paying me, not the 1*s.* a ton originally talked of, but the 55*s.* a ton. There is no doubt that he could have made such a contract, and if he had made it there would be a contract to carry the goods on for freight accruing, and if the mortgagee took possession of the ship whilst that freight was still accruing, he would have the benefit of it—of the whole of it—not of the portion which accrued after he took possession.

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(1) 8 El. & Bl. 493. 4 Jur N.S. 302.

(2) 1 C. P. D. 730.

Doubtless that would be so if such a contract could have been made; but let us look and see whether any such contract has been made. I think it clear that it has not. It must be remembered that *Parrott & Co.* had a right to hold these goods as a security (paying 1*s.* a ton and no more) for their bills of exchange. The case says: "The sum necessary to meet the bills of exchange at maturity was £10,364 19*s.* 4*d.*, and at some time in December, or the beginning of January, it had been arranged between Mr. *Morison* and the Defendants that the Defendants should advance to Mr. *Morison* the moneys necessary for the purpose, that the Defendants in return should be at liberty to sell the cargo and receive the proceeds of the sale on Mr. *Morison's* account, and that the bills of lading and policies of insurance should be deposited with the Defendants as security for their advances." I can read that in no other way than as saying that then there was a binding agreement made between *Morison* and the Defendants by which the Defendants were to furnish the money which would pay off the bills of exchange, and were to have, as security for that, the bills of lading deposited with them just as *Parrott & Co.* had them before, that is, real bills of lading which would entitle them to the possession of the property; that they were besides that to have the policies of insurance which were in the possession of *Morison;* and that for all these advances of theirs they were themselves to have the conduct of the sale of the cargo, the moneys received for which would therefore pass through their hands and be their security; that was the contract.

On the 4th of January they pay a sum of £3000 and receive the policies which *Morison* had got and could then give. They do not pay the money in exchange for the bills of lading until the bills of exchange should become due and the bills of lading should be obtained. On the 2nd of February the bills of exchange did become due, and then *Morison,* with the money advanced by the Defendants, did take up the bills of exchange and pay them, and the bills of lading were then handed over to the Defendants. However in the interim a transaction happens on which Mr. *Bowen* has rested his whole argument. The Defendants had a binding agreement for value between them and *Morison*, and were entitled to have the sale of this cargo, and the proceeds were to pass through their hands. They were entitled to the bills of lading, and they, on their part, had bound themselves to furnish the money necessary for taking up the bills of exchange and something over. Now on that they proceed to sell the cargo. They make a contract. The earlier part of that contract, all but the last three lines, is, I have no doubt, a lithographed form for the sale of a cargo, cost, freight, and insurance, with merely the blanks filled up in writing and the last three lines added in writing. I have seen scores and scores of such contracts, and I have very little doubt that it was a lithographed form that was used.

It must be remembered what the nature of the contract is. It is a contract which is thoroughly well understood amongst merchants. You are to pay a sum down for the cost of the purchase of the goods abroad, for the freight to the port of destination, wherever that may be, and for insurance on the voyage. The mode in which that is carried out is this: the purchaser agrees to pay a sum for those three things. The portion which is measured by the cost and by the insurance is paid by him in exchange for the shipping documents. He parts with no money whatever until he gets those shipping documents, which consist of the bills of lading, the charterparty generally, and the policies of insurance, which are handed over at the time; and then he pays the portion which represents those, but the invoice is always in practice made out in this way. They put down the whole sum, the contract price. They put down what the amount of the freight would be, and then that freight is deducted from the contract price, and what is paid in exchange for the documents is the balance between the freight and the contract price. The freight is still payable by the contract to the vendor of the cargo; but by the agreement between them, instead of taking a payment down for the amount of the freight, it is agreed that that shall be postponed, and shall not be payable until the ship arrives and the goods are delivered. Then instead of paying it to the vendor of the cargo, who then would pay the money to the shipowner, it is agreed that this sum for freight shall be paid to the vendor by paying it to the shipowner, who is constituted by the contract his agent to receive it. That is the ordinary way in which the transaction is carried out. That is the legal effect of it, and an invoice made out in that way is perfectly well understood.

Now, in this case, at the time this contract was made the ordinary rate of freight seems to have been 55*s.* a ton. When the Defendants came to bargain with Messrs. *Jump*, or their brokers, Messrs. *Harris*, on their behalf, they very reasonably and sensibly seem to have said this: "We are making a contract, cost, freight, and insurance, but you know that in that way, if it was a contract with an ordinary merchant we should be entitled to keep back 55*s.* a ton, or £3793, until the ship arrived; if the ship did not arrive in *Liverpool* with the goods, we should keep that in our pockets; if it did arrive we should pay it to you, but we should have three months' interest. You are proposing to us to buy, when the freight by the bill of lading is only for 1*s.* a ton, and the amount of freight would therefore be somewhat less than £70. Instead, then, of keeping back £3793, we shall only, according to this, keep back £70, and the invoice will be made out deducting only £70 from the £13,440, and so making us pay. We do not approve of that at all." And then the Defendants, acting on behalf of *Morison*, seem to have said what you might suppose they would say, "That is perfectly true and perfectly reasonable; but we will agree to this, that the sum you shall keep back under the contract shall be, not 1*s.*, but 55*s.*, per ton; and the invoice shall be made out in that way, that you are to keep back 55*s.*, and not 1*s.*, and that the sum payable after the arrival of the ship, and which you must pay before you can get the goods, shall be 55*s.*, and not 1*s.*, per ton." Messrs. *Jump* were perfectly contented with that; it answered their purposes.

Now, my Lords, let us see how they worded this agreement. "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton of 2240 lbs., and invoice to be rendered accordingly." It has been truly said by the noble and learned Lord on the woolsack that that is inconclusive as it stands. The cargo "coming on ship's account" has nothing to say to the freight being computed at 55*s.*; but if you read it with a parenthesis, which was clearly what the parties intended, it becomes intelligible. It would then read in this way: "As cargo is coming on ship's account, the freight is only 1*s.* per ton, but the sum which is to be kept back by the purchaser, (until the goods are delivered,) is to be computed at 55*s.* per ton, and the invoice is to be rendered accordingly." Put in that way it is quite intelligible, and I am convinced that that is what the parties intended to say. They did not intend to say we are making a new bargain on behalf of *Morison* by which the contract in the bill of lading of 1*s.* a ton for freight is to be altered or set aside, and a new one made instead of it, and the freight, which was originally 1*s.*, is now to be actually 55*s.* They did not say that; Messrs. *Jump* did not agree to that; they had no object in agreeing to it, but, on the contrary, the Defendants had a very excellent reason for not doing it. *Morison* had no interest in it at all, one way or the other. What they do say is this: for the purpose of the invoice the sum to be deducted shall be reckoned as if the freight was 55*s.*, although it is in the bills of lading only 1*s.*

That is all they have done, and having done that, there remained only one thing to be thought of, still—not by Messrs. *Jump*, who would say if they got the goods and paid the money it is well, but by the Defendants. They were to deliver the bills of lading on receiving a certain sum and, at the same time to secure that, the 55*s.* a ton, which was yet to come, was to come into their hands. They stipulated with *Morison*, apparently, that *Morison* should indorse on the bills of lading an authority; a thing that should be a notice to *Jump* that they should be entitled to receive it. Messrs. *Jump* knew that already, but it would be a notice to Messrs. *Jump's* assignees who took the bills of lading from them. *Morison* was to indorse on the bill of lading a notice that Messrs. *Burrows & Perks*, of *London*, are the persons entitled to the freight; that their discharge for the 55*s.* a ton, which is not freight but the sum at which by this agreement the freight is to be computed in the invoice, and to be kept back as freight; that their discharge for that shall be sufficient. Accordingly on the back there is this indorsement. "We assign our interest in the within freight to Messrs. *Burrows & Perks*, of *London*, whose receipt, or that of their appointed agent, will be sufficient discharge. The freight assigned is at the rate of 55s. per ton and not the nominal amount of 1s. per ton." I cannot understand how it could be said that that was a fresh contract, saying that the goods should be carried for 55s. a ton instead of for 1s. a ton. It does not profess to alter the contents of the bill of lading at all. It does profess, and it was required that it should profess to do something else; it gives notice to whoever may come with the bills of lading, that Messrs. *Burrows & Perks*, and they only, are the persons entitled to receive the 55s. a ton; it does not matter whether that 55s. a ton is part of the price, or is freight.

That being so, when the Defendants had received the bills of lading, they took them to *Jump*, and got from *Jump* the invoice price as made out, and then come Messrs. *Ross*, who had become *Jumps'* assignees, ready to pay the 55s. a ton. But it is said on the part of the mortgagee who has come into possession of the ship: this 55s. a ton is not part of the contract price to be paid under the contract with *Jump* as if it had been freight, but it is freight actually created by some fresh contract,—I do not know what;—the parties have entered (it is said) into a new contract—I cannot see how—I do not think that that was the effect of it or that that was ever intended. There is nothing to shew that was the intention of the parties, and there is no rule of law whatever which says that we are to put that intention on the parties, or to put them under a contract other than that which they intended to enter into.

Taking that view of it, my Lords, it seems to me quite clear that the mortgagees' claim is unfounded, and consequently it appears to me that the unanimous opinion of the Court of Appeal is the right one, and that this appeal should be dismissed with costs.

LORD GORDON:—

My Lords, your Lordships have given very anxious consideration to this case, but not more consideration than I think it is entitled to, both with reference to the amount which is in dispute and with reference to the principles which are involved in it. I think it is admitted on all hands that the Plaintiffs, the Appellants in this case, are entitled to claim the accruing profits arising from contracts which were in operation at the time they took possession of the vessel. But the contract which was in operation with regard to the cargo in question, the shipment from *San Francisco*, was for a nominal freight. We know the reason why that was adopted, why instead of a freight of 55*s.* a ton which was the current freight, or at least the usual freight at the time when it came to be delivered, the bill of lading under which the Appellants were entitled to claim, stipulated for only 1*s.* a ton. The Appellants do not rest their case of course upon that, because then the Respondents would be entitled to prevail, as the Respondents have offered 1*s.* a ton; but the Appellants say that they were entitled to enter into a new contract when the cargo had come to this country, and that in point of fact they did enter into a new contract. Now, I believe it is not disputed, it is assumed by your Lordships, that there might be circumstances under which they might be entitled to enter into a new contract; but the difficulty arises upon the question whether there was in point of fact, a new contract so entered into or not. There was no such new contract and I therefore concur in the judgment proposed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th July, 1877.

Solicitors for Appellants: *Freshfields & Williams.*
Solicitors for Respondents: *Lowless & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
1877
July 16.

ALEXANDER BROGDEN AND OTHERS . . APPELLANTS;

AND

THE DIRECTORS, &c., OF THE METROPOLITAN RAILWAY COMPANY . . . RESPONDENTS.

App Cas 1128
D 223,

Contract—Absence of a formally signed Contract—Conduct of Parties supplying the Want of it.

Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either.

In such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form.

B. had for some years supplied the *M. Railway Company* with coals. At last it was suggested by *B.* that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the *M. Company* and sent to *B.* *B.* filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. *B.'s* agent sent back the paper to the agent of the *M. Company*, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the *M. Company*, there were explanations and excuses given by *B.*, and the "contract" was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and *B.* denied that there was any contract which bound him in the matter:—

Held, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it *B.* must be held liable upon it.

B. was the chief partner in a partnership of three persons. The word "approved" written by him and signed with his name was treated as an assent binding on all the partners (whose names were mentioned in the paper), although the usual form of signature of the partnership was that of "*B. & Sons.*"

A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the prices mentioned in it, amounted to sufficient to shew the adoption of the writing previously altered and sent, and to constitute it a valid contract.

Per Lord Blackburn:—The onus of shewing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance.

In this case the directors of the *Metropolitan Railway Company* had brought an action against Messrs. *Brogden & Co.* to recover damages for a breach of contract. The defence was that there was no such contract. The cause was tried before Mr. Justice *Brett,* at the Surrey Spring Assizes of 1873, when a verdict was found for the Plaintiffs, subject to a special case.

The Defendants in the action (the present Appellants) were colliery owners in *Wales*. From the beginning of 1870 the Defendants had supplied the Plaintiffs with coal and coke for the use of their locomotives. The quantities supplied and the prices charged were sometimes varying, and it appeared that, in November, 1871, a suggestion was made in writing by Mr. *Hardman* (the manager for the Defendants) that a contract should be entered into between the parties. Mr. *Burnett,* an officer of the company, was appointed to meet Mr. *Hardman* and to make some arrangement, and the result of the communications between them was that a draft agreement was drawn up. This draft contained the following sentences: "The contractors [which meant *Brogden & Co.*] shall, at their own expense, as from the 1st day of January, 1872 (but subject as hereinafter expressed) supply every week and deliver, in narrow guage railway waggons, for the use of the company, at the *Paddington Station* of the *Great Western Railway,* 220 tons of coal, and any farther quantity of coal, not exceeding 350 tons per week, at such times and in such quantity as the company shall, by writing under their agents' hands, from time to time require." The coal was to be "from the best *Bwllfa Merthyr* four feet seam" and from no other. The payment was to be at the rate of 20*s.* per ton of 20 cwt., the money payable for the same being subject to the existing tolls payable at the date of the agreement to the *Great Western Railway Company,* "but should the existing tolls be advanced or reduced, the price per ton to be advanced or reduced accordingly." Should the contractors make default or become bankrupts, the company was to be at liberty to terminate the agreement by notice. Provisions were made as to strikes, and differences arising between the parties were to be settled by arbitration. Either of the parties was to have liberty to "determine this agreement by giving two calendar months previous notice in writing on the 1st day of November, 1872." If no such notice was given the agreement was to continue in force "for one year from the 1st of January, 1873," both parties agreeing to fulfil and observe the agreements and provisions herein contained, so far as they may then be applicable to existing circumstances. If any differences should arise they were to be referred to "the arbitration of ———, and such person or persons as shall be mutually agreed upon." Such arbitrators to have all the powers given by the *Common Law Procedure Act*, 1854.

This paper was prepared by Mr. *Burnett*, who handed it to Mr. *Hardman* for approval by the Defendants. Mr. *Hardman* submitted it to Mr. *Alexander Brogden*, the head of the firm of *Brogden & Co.*, who dealt with it thus: He left the date in blank. He filled up the part describing the parties by putting in the names of himself and partners. He introduced the word "*Upper*" after the words "*Bwllfa Merthyr*." He altered one of the sentences by substituting the words "during the period of" for the words "while they shall fulfil." He filled in the arbitration clause with the name, "*William Armstrong*, Esq., of *Swindon*," and, finally, he appended the word "approved," and under it signed his own name, "*Alexander Brogden*." He gave the paper back to Mr. *Hardman* to be returned to Mr. *Burnett* for the purpose (as it was said) of having a formal contract drawn in duplicate and signed by the respective parties. If such formal contract had been drawn it would have been signed "*Alexander Brogden & Sons*," instead of merely "*Alexander Brogden*." No formal copy was made. Mr. *Hardman* returned the paper to Mr. *Burnett*, inclosed in a letter dated the 21st of December, 1871, which letter contained these words: "Herewith I beg to return your draft of proposed agreement, *re* new contract for coal, which Mr. *Brogden* has approved. I am obliged to leave town for *Bristol* to-night, and shall be up again on Monday week. If you have anything farther to communicate letters addressed to *Tondu*" [the Appellants' collieries] "will find me." Mr. *Burnett* (who was the proper custodian of the company's contracts for the supply of coke and coal) put the paper into his drawer where it remained. No entry of it was made in the books of the company. On the 22nd of December Mr. *Burnett* telegraphed "we shall require 250 tons per week of locomotive coal commencing not later than the 1st of January next," and sent off a letter the same day to the same effect. Mr. *Hardman* answered, "we have arranged to supply you quantity you name, 250 tons weekly, from the 1st of January." The supply of coals appeared to have been made for some time upon the terms stated; but sometimes there was a failure of the regular supply, and many letters passed between the parties. In most of the letters the contract was referred to. Excuses were made and deficient supplies made up, till finally, in December, 1873, the Messrs. *Brogden* declined to continue the supply of coals in that manner.

An action for damages as for breach of contract was then brought. The Defendants denied the existence of any contract for the supply of coals. The special case was argued before the Court of Common Pleas, and judgment was ordered to be entered for the Plaintiffs, and the damages were assessed at £9643. The case was carried to the Court of Appeal, where Lord Justices of Appeal *Bramwell* and *Amphlett* were for affirming the judgment, Lord Chief Justice *Cockburn* thinking that it ought to be reversed.

This appeal was then brought.

Mr. *Herschell*, Q.C., Mr. *Davey*, Q.C., and Mr. *Beresford*, for the Appellants.

The *Solicitor-General* (Sir *Hardinge Giffard*), and Mr. *W. G. Harrison*, Q.C., for the Respondents.

The case was at first argued before Lord *Hatherley*, Lord *Blackburn*, and Lord *Gordon*. A second argument, by one counsel on a side, was directed, and that took place before the Lord Chancellor (Lord *Cairns*), Lord *Hatherley*, Lord *Selborne*, Lord *Blackburn*, and Lord *Gordon*. On the second argument the Respondents' counsel were not called on to address the House.

Mr. *Herschell*, Q.C., Mr. *Davey*, Q.C., and Mr. *Beresford*, were for Messrs. *Brogden*, the Appellants, The *Solicitor-General* (Sir *Hardinge Giffard*) and Mr. *W. G. Harrison*, Q.C., were for the Respondents.

For the Appellants it was contended that there had not been any completed agreement. It might be admitted that if there had been a writing drawn up, seen and considered by both parties, and signed by one of them, and the assent of the other declared, and if then the terms so written had been acted upon by both, a contract would have been constituted. But that was not the case here. And yet if the Plaintiffs could not shew that such was the case (and the burden of proof was on them) they could not maintain their action. All that had been done was to sketch out what was proposed on the one side, to send that sketch to the other side, and the word "approved" had been written by one of the partners of the firm, and signed with his own name and his own name alone, and not with the proper style and designation of the firm, which was not sufficient, as to the firm, to constitute a valid and binding contract. The case of *Ridgway* v. *Wharton* (1) distinctly declared that a paper sent by one party to the solicitor of the other to put it into form would not be sufficient to constitute a contract, unless both agreed that that was the only purpose for which it was sent, for that the act of so sending it afforded generally cogent evidence that the parties did not intend to bind themselves until it was reduced into form. That rule was exactly applicable here. The mere fact that the parties for some time dealt together on the prices mentioned in the paper here insisted on as the contract, was nothing, for there had been different prices on which their dealings had proceeded before any contract was proposed. *Dunlop* v. *Higgins* (2) shewed that an offer of a contract was not sufficient; there must be a distinct acceptance of it. Here there could have been no acceptance of it. Blanks in the draft had been filled up in a certain way, and a name had been introduced. These were all suggestions which the party to whom they were made might or might not adopt. Till they were adopted they were mere propositions for an agreement, and not parts of a concluded agreement. If the party to whom they were proposed refused to adopt them the proposed contract was not completed. *Warner* v. *Willington* (1), which was the case of a bill for specific performance, much resembled the present, and shewed that there had not been any unconditional acceptance. Where there remained anything to be done to indicate the acceptance and adoption of what had been suggested by one of the parties, the other was not bound, and no contract was constituted: *Jackson* v. *Turquand* (2). Circumstances such as existed here would not even establish the liability of a contributor upon shares in a company: *British, &c., Telegraph Company* v. *Colson* (3).

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(1) 6 H. L. C. 238-9.

(2) 1 H. L. C. 381.

For the Respondents it was argued that everything had been done here which was necessary to constitute a binding contract. A proposition had been made, the duly authorized agents of the two parties had met to consider it; what they had agreed to was reduced into writing, with only such blanks as could easily be filled up, without the fillings-up constituting in the least degree (except perhaps in the name of the arbitrator) new propositions; the paper was sent to one of the principals, and he returned it to the other with the word "approved," and with his signature attached. As to the name of the arbitrator, if that was to be treated as a new proposition, it was a proposition made by Mr. *Brogden*, and at once accepted without observation by the other side. There needed nothing more. The case did not in the least resemble *Ridgway* v. *Wharton* (4) nor *Dunlop* v. *Higgins* (5), nor any of those cases in which either one side alone had acted, or one had sent the other proposals as to which no assent had been given. Here both parties had acted upon the terms proposed. The person who now refused to acknowledge the contract had examined and considered it, and had written that he "approved" it; he was the head of his firm, and his signature was binding; and the other party to whom it was then returned had accepted it as so "approved;" and both parties had for some time and in repeated dealings acted on it, and, in the various letters which had passed between them, whether letters of complaint or otherwise, had

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(1) 3 Drew. 523; 25 L. J. (Ch.) 662.
(2) Law Rep. 4 H. L. 305.
(3) Law Rep. 6 Ex. 108.
(4) 6 H. L. C. 238.
(5) 1 H. L. C. 381.

(1) S C 2 Jur NS. 434.

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referred to it again and again as the contract under which they were conducting their dealings. There was nothing said here, as there had been in *Ridgway* v. *Wharton* (1), about putting the contract into form; it was sent, examined, and "approved;" it was therefore complete, and it was so received and was acted on.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties. But, on the other hand, there is no principle of law better established than this, that even although parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare, still there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description; I mean imperfect and incomplete as regards form.

My Lords, it was owing to the circumstance that your Lordships had in this case to deal with a voluminous correspondence, and that you had not a formal completely executed agreement between the parties, that your Lordships desired to have the case argued a second time before you ultimately disposed of it; but having had that argument on the part of the Appellants, and having heard from their very learned counsel everything which could be urged in support of the Appellants' view of the case, it appears to me, and that seems also to be your Lordships' view, that there is not any necessity for considering the case beyond the point which it has already reached.

Now, my Lords, the facts of which I shall have to remind your Lordships for the purpose of expressing my opinion, need not range over any great length of statement. There is no doubt that

(1) 6 H. L. C. 238.

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before the 18th of November, 1871, the firm of Messrs. *Brogden & Co.* had been in the habit of supplying the Plaintiffs the *Metropolitan* directors, with coal, and occasionally with coke, for the purpose of their railway. The exact prices which were paid prior to the close of the year 1871 are not set forth in the case, but I think it may be inferred from the documents I am about to mention, what the general character of those prices was. On the 18th of November, 1871, the firm of *Brogden & Co.* wrote to the railway directors in these words: "We beg to hand you statement shewing the increase in price of our smokeless locomotive steam coal as supplied to you. The present price is 18*s.* 3*d.* Increased railway rate, 7*d.* Ten per cent. for increase of wages, 9*d.* The price of this particular quality of coal has advanced from 2*s.* 6*d.* to 3*s.* per ton in the market, and we have every reason to believe that it will continue to increase. We shall, however, be willing to make a contract with you for 300 or 400 tons per week at 20*s.* per ton of 20 cwt., delivered at *Paddington.* The supply to be for 12 months and subject to the usual conditions for strikes, and increase or decrease if the railway rate is changed. We also beg to state that we must add 7*d.* per ton to the price for nut coal, being the increase in railway rate." Now, my Lords, that is a letter which explains very clearly its object. There was a rising market, and it was the opinion of the coal producers that the market was going to continue to rise; they state the price which it had already reached, and they tell the railway directors that they will be willing to make a contract for the ensuing year for a certain maximum supply per week, at a fixed price which would be free from any future variations of the market, and the only casualties to which it would be subject would be the contingency of strikes and an increase or decrease of the railway rate from their pits.

No answer appears to have been given to that letter for a month, and on the 18th of December, 1871, the engineer of the railway company writes to the Messrs. *Brogden*, asking for an interview with their representative, relative to the proposed contract for coal. The interview was arranged at once, "with reference to proposed new contract for coal."

My Lords, I dwell upon those expressions for the purpose of reminding your Lordships that the parties were approaching to a meeting for a definite and clearly expressed purpose, namely, to make a contract, which was to last for a considerable length of time, and it will be one of the observations in the case, that the view taken by the Appellants in this case leaves your Lordships entirely without any explanation of what ultimately became of that contract which the parties, clearly, were seriously bent upon agreeing to in some form or other.

However they had this meeting on the 19th of December, and the case finds that at that meeting the representative of the railway company handed over the form of contract or agreement. The date was in blank, the names of the Messrs. *Brogden* were not filled up, and, in the clause with regard to arbitration, the name of the arbitrator was also left blank; the price was fixed in the way which had been mentioned in the letter at 20*s.* a ton, and the continuance of the agreement was to be for a twelvemonth, to run on for another twelvemonth if a notice was not given to terminate by the 1st of November, 1872. This draft, or the agreement in this form, was handed over at this meeting to the Messrs. *Brogden* or to their agent. On the 21st of December, losing therefore no time, and shewing that the parties at this time were clearly bent upon concluding the business, Mr. *Hardman*, the agent of Messrs. *Brogden*, returns the draft agreement with this letter:—[His Lordship read it, see *ante*, p. 668.] The last sentence is important.

Now what had been done with the agreement was this: The date was left in blank as it stood before: the blank with regard to the names was filled up by the introduction of the proper names of himself and his co-partners. The word "upper" was introduced before the words "four-feet seam." But that appears to me, I may say in passing, to have made absolutely no difference, because either it would have become a different seam, which is not suggested, or if it was the same seam it was merely selecting one part of the seam which it would, without that, have been in the power of Messrs. *Brogden* to select; and in the 3rd paragraph of the letter Mr. *Brogden* "drew his pen through the words 'while they shall fulfil,' and interlined in their place the words 'during the period of,' so that the clause read, 'The company shall pay to, or according to, the direction of the contractors every month during the period of this agreement.'" This seems to me also to make no substantial difference in the terms. Then "he filled in the blank in the arbitration clause with the name of '*William Armstrong*, Esq., of *Swindon*,'" and "he put the word 'approved' at the foot of the paper and signed the paper with the name '*Alexander Brogden*.'"

Therefore my Lords, subject to this question about the arbitrator's name, the document became a document signed by a gentleman who was signing clearly as one of the three persons named as partners in the agreement, and it was signed therefore necessarily upon their behalf; and, although the word "approved" is added, that is a word which in this case could not at all have the meaning which the word frequently has in drafts. Often when a draft is signed by a solicitor or a conveyancer as "approved," the word "approved" means nothing more than that the legal form and expression of the instrument is approved. Here the word "approved," signed by one of the partners, could have meant nothing else than this—that he approved of the terms of the agreement on behalf of the partners.

My Lords, the only thing remaining was, as I have said, the insertion of the name of the arbitrator. I quite agree that that required the assent and approval of the railway directors. When they saw the name inserted they might have said, if they had been so minded,—We are not satisfied with this arbitrator—we do not treat this as a concluded agreement between us, we therefore require you to enter upon the negotiation in another form, and we are perfectly free to refuse what you have hitherto proposed. My Lords, it appears to me that it was with regard to the circumstance that there had been the insertion of this name among other matters, that the letter of the 21st of December contained the words to which I have already called your Lordships' attention, "If you have anything farther to communicate, letters addressed to '*Tondu*' will find me." That appears to me to be just what you would have expected, namely, that Mr. *Hardman*, on the part of Messrs. *Brogden*, writes to Mr. *Burnett*: "I send you back the draft of the agreement with the alterations we have made in it; it is now for you to say whether there is anything farther to be remarked upon the matter; if there is I here communicate to you my address'"

My Lords, that draft having been sent in this form to the railway directors, the statement in the case is that "Mr. *Burnett* was the proper custodian of contracts for the supply of coke and coal for the Plaintiffs. On receipt of the paper enclosed in Mr. *Hardman's* letter he put it into his drawer, and it remained there till the 7th of November, 1872, when it was produced to Mr. *Alexander Brogden* on the occasion hereinafter mentioned."

Now, my Lords, I will call your Lordships' attention to what was done subsequent to this date; but before I do so, there is at the very outset this remarkable circumstance, which your Lordships will bear in mind: these two parties having been in negotiation up to the 22nd of December, both of them clearly bent upon making a contract which was to provide for a supply of coals in the following year, both of them engaged upon it, and so seriously engaged upon it that they had reduced it into writing with very considerable minuteness of detail; according to the view of the Appellants, this agreement, which they were so bent on forming, is said suddenly and without any kind of explanation to have passed entirely out of view, an incomplete and unfinished transaction, as regarded which there never was any *consensus* between them, and no explanation is given in any shape or form of why it was, according to the view of the Appellants, that there never was any reference afterwards to the contract, nor any proceeding taken to have it brought to a definite point. My Lords, it would be, indeed, a very strange matter if, both parties having shewn such earnestness in the business to which they were addressing themselves, they were from the moment of the 22nd of December to be held to have parted without any impression whatever that anything had been done towards accomplishing the object of that act upon which they were bent.

But, my Lords, what took place afterwards was this: On the 22nd of December Mr. *Burnett*, getting this draft, putting it where the contracts of the company were placed for custody, writes in return to Messrs. *Brogden & Sons.* He makes no objection to anything which had been done with regard to that document; he is silent upon that subject, but he says, "We shall require

250 tons per week of locomotive coal, commencing not later than the 1st of January next"—the very date which was the date mentioned in the contract for the commencement of the supply—"Reply by wire that you will do this, that we may arrange with other collieries accordingly." My Lords, the contract had provided, with regard to the amount of the supply, that it should be "220 tons of coal, and any farther quantity of coal not exceeding 350 tons per week, at such times and in such quantity as the company shall by writing under their agent's hands from time to time require, such notice to be given to the contractors or agents of the contractors for the time being."

Now reference was made to this letter, and some argument was raised upon it to the effect that it was a letter asking Messrs. *Brogden* to reply by wire whether they would supply the 250 tons, and that it was therefore inconsistent with a right to order that supply. My Lords, it seems to me to be the most natural letter possible for persons who had a contract to have written. They order a supply within the terms of the contract greater than the minimum, which was 220 tons, but within their power as regards the maximum; and it seems to me that, inasmuch as they had to give notice with regard to the times and the mode of any supply over 220 tons, it was only what men in that position would have done, to ask those who had to make that supply whether they might depend and rely upon their affording it at the times and in the quantity which were thus specified.

My Lords, on the 22nd of December Messrs. *Brogden & Sons* telegraph to the railway directors, "We have arranged to supply you quantity you name, 250 tons weekly, from 1st January." And without going through the letters as to the change of supply, I may say that the quantity was afterwards changed to a quantity of 350 tons per week, which also was a quantity not beyond the maximum mentioned, but the actual maximum mentioned by the contract.

Now, my Lords, what I have to ask myself is this: the draft having been returned with only one variation to which, as far as I can see, any objection could have been taken, namely, that with reference to the arbitrator, and no objection having been made upon the score of the insertion of his name, although any commu-

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nication which might have been made must distinctly have been made in writing; I have to ask, how is the course of action of the parties—the suppliers of coal and the railway company—during the following year to be accounted for? In the first place, my Lords, the railway directors commence by ordering a supply exactly at the date specified in the contract; and, in the next place, and this is a point which I am bound to say appears to me not in any way to have been met by the very able argument we have heard, and yet to be all important in the case—the price from that date, the 1st of January, commences to be, and continues to be, throughout the year, the very price stipulated for in the contract. And farther, that price is a price differing from the price which had prevailed up to that time. And not only is that so, but during the whole of the year, when, of course, the market price was varying from time to time, this price never changes; it is an unvarying price throughout the year. And, my Lords, more than that, to that price there are added upon two occasions exactly the sums which by the contract might be added, namely, the sum of 5*d.* in the one case, and 6*d.* in the other, upon the charge of the *Great Western Company* being raised for the carriage of the coal. Then, my Lords, not only does the supply commence at the time mentioned in the contract, not only is the price the price which is explained by the contract, and cannot be explained in any other way, but in addition to that, the quantity is the quantity mentioned in the contract, and during the greater part of the year is exactly the maximum quantity authorized by the contract to be required.

Farther than that, your Lordships have in one of the lett[illegible] reference which, again I must say, has not in any way been explained to my satisfaction, and which I am unable to explain except by referring it to this contract—I refer to a letter of the 25th of July, 1872. "We find," says the agent for Messrs. *Brogden*, "that from 1st January to June 30th you received $8835\frac{15}{}$ tons, which equals 340 tons per week, or about 40 tons per week more than your contract." I have asked what is the meaning of the expression "more than your contract" there? and no explanation has been given of it. No explanation can be given of it unless it refers to the contract in question. It is quite

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true that, as it is said, the contract in question did not provide for a maximum of 300 tons per week, but of 350. My Lords, that may be so, but an error as to the maximum mentioned in the contract does not make it any the less a reference to the contract, and the letter cannot be explained in any other way. I think I can see how it came to pass that Messrs. *Brogden* spoke of the maximum supply as being 300 tons. I think it arose in this way: When they themselves first proposed the contract they had proposed a contract for a supply of 300 or 400 tons, and it may well be that, not having kept a copy of the contract, they may, in a loose way, have thought that 300 tons had been the agreed upon amount which they had to supply under the contract. However, whether that was so or not appears to me to be quite immaterial. Here is an express admission by them, which it seems to me to be impossible to get over, that they were supplying coals under a contract, and no contract can be suggested except the contract to which I have already referred.

But, my Lords, over and above that, I must say that having read with great care the whole of this correspondence, there appears to me clearly to be pervading the whole of it the expression of a feeling on the one side and on the other that those who were ordering the coals were ordering them, and those who were supplying the coals were supplying them, under some course of dealing which created on the one side a right to give the order, and on the other side an obligation to comply with the order. If it had not been so, I cannot conceive how when there were these repeated complaints against the Messrs. *Brogden* for short or irregular supplies, and when they say more than once that the prices they were receiving from the *Metropolitan Company* did not make their bargain a good one, or did not make the *Metropolitan Company* good customers, how it was that if they did not feel that there was a contract somewhere or other entitling the *Metropolitan Company* to a supply, and binding them (the *Brogdens*) to supply coal, they did not say, If you do not like the mode in which we are supplying, or the extent to which we are supplying, it is quite easy for you to get your supplies elsewhere, and we are under no obligation to supply you. They do not do that; on the contrary, they go on asking for indulgence and consideration in a way which it appears to me to be impossible to account for, except upon the footing which they recognise in the letter I have read of the 25th of July, that there was a contract under which there was some maximum or other up to which they were bound to supply the coal.

My Lords, those are the grounds which lead me to think that, there having been clearly a *consensus* between these parties, arrived at and expressed by the document signed by Mr. *Brogden*, subject only to approbation, on the part of the company, of the additional term which he had introduced with regard to an arbitrator, that approbation was clearly given when the company commenced a course of dealing which is referable in my mind only to the contract, and when that course of dealing was accepted and acted upon by Messrs. *Brogden & Co.* in the supply of coals. Therefore, my Lords, I am of opinion that the conclusion at which the Court of Common Pleas arrived was correct, as was also the conclusion at which the majority of the Court of Appeal arrived.

My Lords, I am bound to say, with regard to the very elaborate judgment of the Lord Chief Justice, that, if I could as a matter of fact arrive at the conclusion in one respect at which he arrived upon the question of fact, I should be very much inclined to concur in the whole of his judgment. As I understand it from the passages to which I have referred in the judgment of the Lord Chief Justice, which I will not read again, it was the opinion of the Lord Chief Justice that, to use his own words, the Court might "safely infer" that the applications to the *Metropolitan Company* which are mentioned in one of the letters had actually been made. The Messrs. *Tahourdin*, the solicitors for the company, no doubt being instructed that such was the case, had stated in their letter that the agent of Messrs. *Brogden* "afterwards repeatedly, at intervals, applied to the company's agent for the agreement to be completed, but could never obtain it, and was in fact told that there was no agreement, and, at all events, though often applied to thus, the company have taken care never to place themselves in a condition to be charged by Messrs. *Brogden* upon the alleged contract in case of breach on their part." My Lords, if I found it proved that an application had been made by the Messrs. *Brogden* to the railway company for an agreement, and to have the agreement or contract completed, and that they had been told that there was no contract and no agreement, it seems to me that it would have gone far to answer all the observations I have already made. But I have no doubt that if the Messrs. *Tahourdin* had found that they had been correctly informed when they made this statement, they would not have failed to prove, and they would have had the means of proving, before the arbitrator who stated the special case, the facts which thus they state in their letter. I take it that it must be inferred from the fact that no such proof was given, that no such proof could be given, and therefore these statements must entirely be removed out of the case. And, they being removed out of the case, I cannot but think that the judgment of the Lord Chief Justice is deprived of what would have been one of the strongest arguments in support of it.

My Lords, I must move your Lordships that the judgment of the Court of Appeal be affirmed, and that this appeal be dismissed with costs. In one respect one cannot help feeling some anxiety, as I have felt about the case throughout, because one cannot help believing that, whether from carelessness or not I know not, Messrs. *Brogden* had not actually in their possession a copy of the agreement, and that in all probability they were not aware that the 1st of November was the last day on which they could have terminated the agreement, as probably they would have terminated it without entering upon another year. With that, however, we cannot deal, we must administer the law as the rights of the parties really stand.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. I cannot but feel great satisfaction at the case having been heard on a re-argument before your Lordships, because, not only is it one of considerable importance to the parties on both sides in point of amount, but the case, it seems, had been argued in the Courts below before no less than seven of Her Majesty's

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Judges—Judges of great eminence (1)—and a contrariety of opinion on the part of one at least of those learned Judges had been expressed as regarded the conclusion proper to be come to; in this respect differing from the majority in each Court

My Lords, Mr. *Herschell*, in his extremely able argument in this case, has given us every assistance that we could wish to have for its determination, and has, as it appears to me, put the case on a very proper foundation, when he says that he will not contend that this agreement is not to be held to be a binding and firm agreement between the parties, if it should be found that, although there has been no formal recognition of the agreement in terms by the one side, yet the course of dealing and conduct of the party to whom the agreement was propounded has been such as legitimately to lead to the inference that those with whom they were dealing were made aware by that course of dealing, that the contract which they had propounded had been in fact accepted by the persons who so dealt with them. That really is the case which we have to try:—[His Lordship here stated the facts of the case.]

When I look to the agreement, I find that the draft agreement is founded upon a letter, although not prepared immediately upon the receipt of the letter, and is in accordance with that letter in respect of the price, in respect of the arrangement for strikes, in respect of the arrangement for increase or decrease if the railway rate is changed, and in respect of the arrangement as to time—that it is to be for twelve months. All those matters we find in the letter of the 18th of November, and that letter having been written by Messrs. *Brogden* had been considered by Mr. *Burnett* on behalf of the railway company. Mr. *Burnett*, in addition to these matters, which I have referred to as being embodied in the letter of the 18th of November, adds a clause by which, instead of saying vaguely that the supply shall be between 300 and 400 tons per week, says definitely that the supply shall be of 220 tons of coal per week, or a farther amount not exceeding 350 tons (splitting the difference between the 300 and 400 tons) "per week at such times and in such quantity as the company shall by writing, under their agent's hand, from time to time require, such notice to be given to the contractors or agents of the contractors for the time being."

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(1) In the Common Pleas Lord *Coleridge*, Mr. Justice *Brett*, Mr. Justice *Grove*, and Mr. Justice *Lindley*. Their judgment was affirmed in the Court of Appeal by Lord Justice of Appeal *Amphlett*, and Lord Justice of Appeal *Bramwell*; Lord Chief Justice *Cockburn* dissented. The case was not reported in the Court below, but the opinions of the Judges were referred to in some of the judgments delivered in this House.

Then Mr. *Burnett* puts into the agreement a clause for the benefit of his employers, the company, which is this, that in case "the company find it expedient to suspend the use of coal by reason of its being found by them to be detrimental to the atmosphere of the railway, owing to high temperature in summer or otherwise, and to use in lieu thereof coke, they shall be free to suspend the use of coal for the time being, and the time or times during which the company shall be required to take the coal shall be enlarged to correspond with the period or periods of suspension." That is a new clause which I do not find in the letter of November the 18th. I find also a second new clause, and a very important one, inasmuch as it gives rise to the present claim in this action. It is a clause providing that in default of notice being given by one or other of the parties two calendar months before the expiration of the twelve months, the agreement shall go on for another twelve months. That together with the appointment of an arbitrator, makes all that you find in the agreement in addition to what is contained in the letter of the 18th of November.

Now, I mention these facts to shew how very little there was for either of the parties to consider. It was not necessary to take a long time for consideration, and the importance of this part of the case is with respect to the view which was taken by the learned Lord Chief Justice who differed from the other Judges in his conclusion upon the case, namely, as to whether or not it was contemplated when this agreement was put into writing, that there should be a farther formal agreement in the sense of a formal agreement to be considered by the solicitors on both sides, and to have such variations made in it, I suppose, as those solicitors might suggest, or anything of the kind. My Lords, instead of that it is a plain simple practical agreement confined to very few particulars, such particulars as Mr. *Hardman* on one side, and Mr. *Burnett* on the other, who were both practical men, were perfectly competent to form an opinion upon.

That being so, I apprehend, my Lords, that the case is entirely outside the class of authorities referred to in the judgment of the Lord Chief Justice, in which it has been said that under the peculiar circumstances of the case, if it be clearly and definitely intended that the matter shall not be concluded until it has been not only arranged but settled, and put into a formal shape, that intention will, of course, prevail, and it will not be held to be concluded until such formal shape has been superinduced upon it, and it has been settled as intended by the parties, and of course there will be a *locus pœnitentæ* until that matter has been achieved.

Here, instead of that, we find that the draft, as prepared by Mr. *Burnett*, is sent to Mr. *Hardman* for approval, and then submitted by Mr. *Hardman* to Mr. *Alexander Brogden*, who was a person fully authorized to act on behalf of the Defendants' firm. [His Lordship here described what had been done by Mr. *Brogden* before the paper was returned to Mr. *Burnett*.]

My Lords, the case states that "after so dealing with the paper, the said *Alexander Brogden* gave it back to Mr. *Hardman* to be returned to Mr. *Burnett* for the purpose of having a formal contract drawn in duplicate, and signed by the vendors and the purchasers, and the formal contract if so drawn and signed would have been signed *John Brogden & Sons*, and not *Alexander Brogden*," and no doubt it would also have had the seal of the company. But that is not at all the class of changes and alterations which is aimed at in those cases to which I have already referred as having been cited, with reference to whether or not the parties should be bound until the formalities had been complied with. Here there really was nothing to be done on the part of the colliery owners, because they had settled and approved of this; nor was there anything to be done on the part of the railway directors beyond an intimation of whether or not they intended to act upon that document so signed, and with such variations as I have described.

Now, my Lords, what took place? This document, so dealt with and so handed over to Mr. *Hardman* as signed by Mr. *Brogden*, was given to Mr. *Hardman* to be returned to Mr. *Burnett*:—[His Lordship stated what had then taken place, and quoted at length several letters on the matter of the supply, and the complaints that it was deficient, and excuses on account of the colliers not working, and promises to send the required supplies.]

Now, my Lords, I apprehend that if it had stopped here, this is a course of action from which the inference would fairly be drawn which becomes quite conclusive afterwards. Up to the present stage to which I have brought it the case stands thus: Agreement proposed first of all by the coal company, sent as a proposition to the railway company, converted by the railway company into a definite agreement with some very slight alterations, sent back again with these few alterations and then adopted and approved by the coal company with only one important farther alteration, namely, the insertion of Mr. *Armstrong's* name as the arbitrator—a letter written with it by the person engaged in the whole negotiation on the one side, saying that he could not see the person who was negotiating on the other side until the time when the agreement was to come into effect—that immediately followed by an order for coals to the extent of 250 tons—an inquiry sent by telegram, and an anxious inquiry by letter also saying:—"Let us know whether we can rely upon your supplying us with 220 tons of coal per week, because, upon your answer whether you can or cannot supply us with that quantity will depend the arrangements I am to make with other coal companies in the North.

It was said that this was inconsistent with the Plaintiffs having an agreement by which the Defendants had bound themselves to supply that quantity of coal. I do not see any such inconsistency whatever. It might possibly bear on the question of whether the agreement was actually clenched at that moment or not. It might indicate this: If you cannot answer definitely that you can supply us with the 250 tons of coal, we may feel ourselves at liberty then to deal with the other coal companies—that might possibly be the true view of it, in which case it struck me it might be said that it was not *eo instanti* that the agreement was clenched. However, what followed did clench it most distinctly, because there not only comes the answer, "We can supply you with the quantity, which is all you want to know in making your arrangements with the other companies"—not only do they say they can do it, but they do it, they send it at the time proposed, namely, January, and invoice it at the price mentioned in the agreement, which differs from the price at which they formerly invoiced it. And at a subsequent part of the transactions, when they were reproached for not sending the supplies in the quick, orderly and regular manner in which the Plaintiffs conceived they were entitled to receive them, all they said in reply was: "We are sending you as much as you are entitled to receive by contract." It is that remarkable letter which the Lord Chancellor has already commented upon, namely, the letter saying, "We have sent you a quantity exceeding that which you are entitled to per contract." I think the mistake in the quantity when they say "per contract" is very easily explicable in this way, that not having a copy of the agreement they could not refer to it with accuracy. They probably had a copy of their letter of the 18th, in which they offered to send from 300 to 400 tons, and they may very well have conceived that the quantity stated in the agreement was 300 tons instead of 350. But how they came to refer in their letter to a "contract," when, as they now say, contract there was none, is a much more difficult question to answer, and it is one with which Mr. *Herschell*, notwithstanding all the ability he has displayed in the case, has been unable to grapple.

My Lords, I will not go through the whole of these transactions. If you ask me, when in my judgment the agreement was complete, I answer that the agreement was complete when the first coals, the 300 tons of coal supplied in January, were invoiced at the differing price, and when that differing price was accepted and paid. I think that did bring the case up to what Mr. *Herschell* very fairly admitted, as he was bound to admit it, would be a sufficient case to make out on the part of the Plaintiffs. It does establish a course of action on the part of the Plaintiffs of such a character as necessarily to lead to the inference on the part of the Defendants that the agreement had been accepted on the part of the Plaintiffs, and was to be acted upon by them; and they did act upon it accordingly.

I think, my Lords, it is not necessary for me to go into more detail. I confess that there is no part of the correspondence throughout, that at all shakes the view I entertain in this case as derived from the documents which I have already referred to, and I am therefore of opinion that the Plaintiffs are entitled to succeed in the action, and that the appeal should be dismissed with costs.

LORD SELBORNE:—

My Lords, the question which is brought before your Lordships in this case is entirely one of fact, namely, whether the dealings between these parties in the year 1872 were upon the footing of the draft contract signed by Mr. *Alexander Brogden* in December, 1871. Now, my Lords, the material facts which introduce the dealings are simply these:—There having been dealings between these parties going on in the preceding year, the prices increasing, and Mr. *Brogden* having intimated that he looked forward to a definite arrangement by which some increase of price could be agreed upon, and in the meantime would supply at a lower price, the Messrs. *Brogden* themselves, in the letter which has been mentioned of the 18th of November, 1871, make a most clear and definite proposal to supply at the price of 20*s*., which was an increase upon the original price, but less than the price which coal might be expected to reach in the course of the year in a rising market, but to do that only upon the terms of a twelve months contract, and for a definite quantity. That was an arrangement which had been looked forward to beforehand; it was an arrangement which they themselves proposed; and I must own that I do not follow the passage in the Lord Chief Justice's judgment, in which he says that in November the price of 20*s*. had been given as that at which the coal owners were willing to supply coal. It is by no means so; they are willing to supply upon a large contract to continue for twelve months, but I can find nothing from which I can infer that, at any time, they would have been willing to supply coal at that price from week to week, or from month to month, or otherwise than upon a twelve months contract.

That being the Messrs. *Brogden's* proposal for a contract, the directors draw up a formal agreement upon the footing of that proposal, but with the addition of at least one very material term, namely, that it shall go on beyond the year unless a certain notice is given to terminate it. They send that to the *Brogdens*, and Mr. *Alexander Brogden* makes no alteration whatever in it except by filling up the blanks, the way in which one of those blanks, the blank for the name of the arbitrator, was filled up, being no doubt a matter to which it was necessary that the other party should assent. Then he or his agent, Mr. *Hardman*, sends it back to the company with the letter of the 21st of December, 1871, signed in a manner which clearly binds them beyond all doubt if it was assented to or acted upon on the other side, and adds this, which I think is most material, and really the key almost to everything which follows:—"If you have anything farther to communicate, letters addressed to *Tondu* will find me." That distinctly shews that he thought at all events that it might not be necessary that there should be any farther communication, not that it was in his mind that unless he heard anything farther the whole matter was to drop, but that he should take it that silence gave consent. The nature of his alterations was such that he had no reason whatever to expect that there would be, or could be any objection to them, and it was the most natural thing in the world for him to look upon it as uncertain whether any communication would be thought necessary on the part of the company.

Now, my Lords, I by no means say that if nothing had been done upon the footing of the agreement, silence would have given consent in such a sense as to bind the parties on either side. If either Lord *Coleridge* or Mr. Justice *Brett* intended to express an opinion that a mere mental consent given under those circumstances, and followed up neither by communication nor by action, would make a binding contract, I should certainly hesitate very much before I assented to that proposition. I do not know that it is necessary so to understand their expressions. No doubt their Lordships did say that mental consent without communication or intimation might do, but then probably their Lordships did not intend to leave out of sight action following upon that assent and consistent with it.

However that may be, this sentence is most material to the interpretation of what follows. The one party writes to the other in terms which I interpret to mean this; I do not suppose you will have anything farther to say, or that you will make any objection to the way in which I have filled up these blanks, but, if you have anything farther to say, let me hear from you. Now what follows? On the very next day, the 22nd of December, not indeed mentioning this contract, but dealing with the subject-matter of it, *Burnett* writes and says, "We shall require 250 tons" (that is the quantity which we shall want supplied) "per week of locomotive coal commencing not later than the 1st of January next," that was the very day on which the agreement was to take effect. I can hardly present to my mind the point of view from which any person can refuse to connect the letter of the 22nd of December with the letter of the 21st of December, which said, "if you have anything farther to communicate." The company's agent had this to communicate—the quantity we shall want is 250 tons per week, and we shall want that supply to commence as early as the 1st of January, the day mentioned in the agreement. To my mind that is a clear reference to the agreement which had been drafted, although the agreement itself is not mentioned.

Then, my Lords all that follows, the immediate requirement on the very same day to supply that quantity from the 1st of January, the action (which I see no reason for referring to any other period) of stopping the supply they had been receiving of fuel from the North on the faith of this agreement upon which they can rely, the quantity originally less but soon raised to the maximum of 350 tons a week, and spoken of in many letters as "the full weekly quantity of 350 tons," and finally so spoken of in the following terms, in a letter of the Messrs. *Brogden* themselves, "We hope to be able to deliver your full quantity," and the price charged being the same as that mentioned in the contract—it appears to me that every single circumstance points quite unequivocally to this agreement; and, looking at the order of events with regard to the dates and the communications between the parties, I should have thought it absolutely impossible for any person to doubt that, if the directors, after getting the benefit of the lower price for nearly an entire year, had afterwards endeavoured to turn round because the price might have risen in

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the market, they would have been turned without much hesitation out of any Court into which they had come.

Now it is said that Messrs. *Brogden* could not have understood it so, because they did not give the notice which they might have given at the beginning of November. My Lords, I think there is an extremely simple and easy explanation of that as well as of their letter of the 25th of July, in which they speak of a "contract," although shewing some error as to its terms, and also of the peculiar terms of that letter of the 7th of November, written immediately after the dispute had arisen, in which they say that if the agreement is exchanged they will go on to the end of the year, but they will not go on any longer without new terms being settled. The explanation of the whole to my mind is this,—they had not kept a copy of the agreement which Mr. *Alexander Brogden* had signed;—they had kept a copy of their own letter of the 18th of November, containing their proposal in which there was no provision for carrying on the contract beyond the end of the year, unless notice were given, and of course nothing whatever as to the time at which such notice was to be given. They had been acting under the impression that the actual contract was on the footing of that letter, probably thinking that the less number of tons mentioned there, namely 300, had been settled instead of the greater 400, which would explain the calculations in the letter of the 25th of July. They had been acting throughout upon the footing not that there was no contract, but that the contract was in that respect different in its terms from what it actually was, and when they found that they had made that mistake, they tried to get out of the contract altogether.

That my Lords is the clear conclusion to which if I was a juryman sitting upon this case, I should come upon the case, which entirely rests upon fact. I therefore entirely concur in the motion which has been made to your Lordships by my noble and learned friend on the woolsack.

LORD BLACKBURN:—

My Lords, in this case the question which has now to be decided is, I believe, quite a question of fact; but part of what was said

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in the Court of Common Pleas would raise an important question of law, if it were to be taken in a way in which it was not necessary for either Lord *Coleridge* or Mr. Justice *Brett* to hold it, and in which therefore they both said, looking to the facts which had been found, they did not hold it. I wish to say upon that point that I cannot agree with what seems to be their view. Mr. Justice *Brett*, referring to the case of *Ex parte Harris* (1) before the Lords Justices, and other cases, says that, looking to all this, he has come "to a strong opinion that the moment one party has made a proposition of terms to another, and it can be shewn by sufficient evidence that that other has accepted those terms in his own mind, then the contract is made, before that acceptance is intimated to the proposer." And he goes on to say, applying that to the present case, that, to his mind, as soon as *Burnett* put the letter into his drawer, a contract was made, although none was formally entered into.

My Lords, I must say that that is contrary to what my impression is, and that I cannot agree in it. If the law was as intimated by Mr. Justice *Brett*, there would be nothing to discuss in the present case. But I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound. If a man sent an offer abroad saying: I wish to know whether you will supply me with goods at such and such a price, and, if you agree to that, you must ship the first cargo as soon as you get this letter, there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea, it would go to the bottom of the sea at the risk of the orderer. So again, where, as in the case of *Ex parte Harris* (1), a person writes a letter and says, I offer to take an allotment of shares, and he expressly or impliedly says, If you agree with me send an answer by the post, there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear.

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(1) *In re Imperial Land Company of Marseilles*, Law Rep. 7 Ch. Ap. 587.

But when you come to the general proposition which Mr. Justice *Brett* seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that. It appears from the Year Books that as long ago as the time of *Edward* IV. (1), Chief Justice *Brian* decided this very point. The plea of the Defendant in that case justified the seizing of some growing crops because he said the Plaintiff had offered him to go and look at them, and if he liked them, and would give 2*s.* 6*d.* for them, he might take them; that was the justification. That case is referred to in a book which I published a good many years ago, *Blackburn* on Contracts of Sale (2), and is there translated. *Brian* gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, as early as that time, exactly as the law now stands, and he consequently says: "This plea is clearly bad, as you have not shewn the payment or the tender of the money;" but he goes farther, and says (I am quoting from memory, but I think I am quoting correctly), "moreover, your plea is utterly naught, for it does not shew that when you had made up your mind to take them you signified it to the Plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is; but I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them signify it to such and such a man, and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact." I take it, my Lords, that that, which was said 300 years ago and more, is the law to this day, and it is quite what Lord Justice *Mellish* in *Ex parte Harris* (3) accurately says, that where it is expressly or impliedly stated in the offer that you may accept the offer by posting a letter, the moment you post the letter the offer is accepted. You are bound from the moment you post the letter, not, as it is put here, from the moment you make up your mind on the subject.

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But my Lords, while, as I say, this is so upon the question of law, it is still necessary to consider this case farther upon the question of fact. I agree, and I think every Judge who has considered the case does agree, certainly Lord Chief Justice *Cockburn* does, that though the parties may have gone no farther than an offer on the one side, saying, Here is the draft,—(for that I think is really what this case comes to,)—and the draft so offered by the one side is approved by the other, everything being agreed to except the name of the arbitrator, which the one side has filled in and the other has not yet assented to, if both parties have acted upon that draft and treated it as binding, they will be bound by it. When they had come so near as I have said, still it remained to execute formal agreements, and the parties evidently contemplated that they were to exchange agreements, so that each side should be perfectly safe and secure, knowing that the other side was bound. But, although that was what each party contemplated, still I agree (I think the Lord Chief Justice *Cockburn* states it clearly enough), "that if a draft having been prepared and agreed upon as the basis of a deed or contract to be executed between two parties, the parties, without waiting for the execution of the more formal instrument, proceed to act upon the draft, and treat it as binding upon them, both parties will be bound by it. But it must be clear that the parties have both waived the execution of the formal instrument and have agreed expressly, or as shewn by their conduct, to act on the informal one." I think that is quite right, and I agree with the way in which Mr. *Herschell* in his argument stated it, very truly and fairly. If the parties have by their conduct said, that they act upon the draft which has been approved of by Mr. *Brogden*, and which if not quite approved of by the railway company, has been exceedingly near it, if they indicate by their conduct that they accept it, the contract is binding.

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(1) 17 Edw. IV., T. Pasch case, 2.

(2) Page 190 *et seq.*

(3) Law Rep. 7 Ch. Ap. 593.

But then, my Lords, I think Mr. *Herschell* was justified in what he said, that the *onus probandi* lay upon the railway company who were asserting that, and that it was a question whether enough was done to shew that it must be taken that the two parties did agree. Upon that I had on the former argument come to the conclusion, agreeing there with Lord Chief Justice *Cockburn*, that there was not enough here to shew that the onus was satisfied, and

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that the acting upon the draft was completely made out. I have heard the argument of Mr. *Herschell* again to-day, and every word that could be said upon the subject in support of that view was, I am quite confident, said by him. Notwithstanding that argument, the majority of your Lordships think otherwise. I think, as indeed I thought before, that there is *some* evidence here that the parties had so treated the draft agreement. I do not think it can be said to be conclusive evidence, but it is evidence on the question of fact to justify the conclusion to which the majority of your Lordships have come. But after listening to what has been said, and farther considering it, I can only say that I hesitate whether I should agree in the verdict or not. I do not say that I dissent from it, I only say that I hesitate about it.

Now, my Lords, I will say very briefly what I have to say upon this subject, just to indicate where it is that I have my doubt. I think that when the draft was sent in that letter there had been considerable delay. They had begun to talk about making this contract in October. The Appellants wrote making an offer in November; they had an interview on the 18th of December, and they had run it on until the 22nd of December, when Mr. *Hardman* writes: "Herewith I beg to return you draft of proposed agreement, *re* new contract for coal which Mr. *Brogden* has approved," according to grammatical construction that means "which draft he has approved." Then it goes on: "I am obliged to leave town for *Bristol* to-night, and shall be up again on Monday week" (that is the 1st of January). "If you have anything farther to communicate letters addressed to *Tondu* will find me." Now, upon that, viewing it there, I certainly think it was contemplated that there might be something more to be communicated, there might be indeed need to be something more communicated as to whether they agreed upon the arbitrator or not; but I think that might be communicated without any express words doing it, if the parties shewed that they were willing to go on upon those terms.

The next letter that passes is this—I pass by the telegram—Mr. *Burnett* writes, "I am in receipt of your letter of yesterday, informing me of your having been obliged to go to *Bristol*, and thereby prevented calling, as expected, to see me regarding the supply of coal. As the matter is pressing" (it must be remembered that the 1st of January was fast approaching), "and as you will not be in town again until Monday week, I have just telegraphed to you as follows:—'We shall require 250 tons per week of locomotive coal, commencing not later than 1st of January next. Reply by wire, that you will do this, that we may arrange with other collieries accordingly;' as it is necessary for us to know definitely what you can do for us in the way of locomotive fuel, so that we may arrange with other parties who are supplying us at present. The supply of your coal seems to be very irregular at present." Now, as regards that letter, the impression on my mind is, that if it stood alone it would fairly admit of this construction, I, the writer, Mr. *Burnett*, am not prepared to say whether my directors will enter into the contract or not. I have put aside the agreement to consider about it, but, as unfortunately you are out of the way, and the 1st of January is fast coming, I telegraph to you and ask you, can you supply us with 250 tons of coal per week from that time forward, pending the time which we have taken to consider. If that were so, clearly that would not have bound the contract.

But, then, comes a thing which does make strong evidence, and which, I think, the noble and learned Lord who spoke first on the other side of the House (Lord *Hatherley*) has placed his reliance mostly upon, which is this: After he had written that letter there comes, on the 2nd of January, again a letter complaining of short supplies, which must of course have meant short supplies prior to the 1st of January, but going on: "I would remind you that it was on your assurance that your firm could send us a regular weekly supply of 250 tons that I stopped our supply of fuel from the North." And in a letter to the principals at the same time, he says: "I now remind you that we stopped the supply of coke from the North on your Mr. *Hardman's* assurance that you would be able to send us a regular supply of 250 tons per week." I thought, at first, that the Lord Chief Justice's explanation of that letter was the right one, and that when he said, "Upon your assurance you would be able to send us a regular supply of 250 tons per week" "we stopped the supply of coke from the

North" that necessarily pointed back to the time when the strike ceased; but I am not by any means certain now that that is right. I think it is very possible that they might have been getting a supply of coke as fuel from the North, and what is meant here is, that it was in reliance upon the statement in your telegram, in which you told us you would supply us with 250 tons per week, that we stopped the supply of coke from the North. That is an observation not without weight.

It is true that that letter was not written as to a person who had a contract,—Remember you have bound yourself to give me 250 tons a week, and I hold you to your engagement. It is rather a complaint; it is put in this way: Recollect that you said you would give us that supply. It is, therefore, more a kind of letter which I might call a neutral letter, pointing not very distinctly to either one view or the other.

But then, my Lords, comes this fact: after that letter there is a supply all through the month of January of a considerable quantity, and all of that coal is invoiced and paid for according to the contract price of 20*s*., which was higher than the price had been before. That was evidence, and strong evidence, that the parties had entered into a new contract; that both of them meant to enter into a new contract, I think, cannot admit of any doubt. It is upon that that Lord Justice *Bramwell* almost entirely bases his judgment. I do not, myself, feel that it is quite so strong as he does. It is, to my mind, evidence, and strong evidence, that they were agreeing. Viewing it as a question of fact, if a jury were to take that view, and were to find that that would be enough to bind the contract, I could by no means say that they were not right. My own view is, that I hesitate a good deal as to whether there is enough to satisfy the *onus* which is cast on the *Metropolitan Railway Company* to establish a contract; but farther than that hesitation I will not go.

I will not detain your Lordships any longer by remarking upon the other portions of the case. Some of the letters read one way and some the other. I can only say that apart from that change in the price I should have thought that they could all be explained consistently with saying that the bargain was not made; but this is a piece of evidence, and a strong piece of evidence, bearing upon that. It is a question of fact, and I think there is no doubt at all that if the evidence of fact is sufficient, there is quite enough to bind the contract.

LORD GORDON :—

My Lords, the case has been so fully discussed by the noble and learned Lords who have addressed your Lordships that I think it would be unbecoming in me at this late hour of the day to trespass upon your Lordships' time longer, except to express my hearty concurrence in the views which have been stated by the Lord Chancellor, and to say that, as a juryman, I have no doubt whatever in coming to the conclusion that the judgment ought to be in favour of the Respondents, the railway company.

There is no question of law involved in the case except the one which has been referred to by Lord Chief Justice *Coleridge* and Lord Justice *Brett,* and I quite concur in the observations which have been made by my noble and learned friends opposite (Lord *Selborne* and Lord *Blackburn*) deprecating the views which they expressed with reference to the possibility of a mental assent, as it has been called. In this case we have no evidence whatever of consent by putting the document into a drawer, an operation of the meaning of which we really know nothing whatever. We have no evidence with regard to the character of the documents which are kept in that drawer. I think in this case your Lordships can have no hesitation in coming to the conclusion which has been expressed by the majority of the learned Judges throughout. The only difficulty I felt was when reading the very elaborate and able judgment of the Lord Chief Justice in favour of the Appellants. I thought that great weight was due to anything coming from that quarter, and he had grappled with all the facts of the case, as I thought. But I find that he relied very much upon a letter written by the solicitors for the Appellants, stating that there had been repeated remonstrances or applications made to the solicitors for the railway company for some evidence of acceptance of the contract; but in reality that statement of the solicitors was unsupported by evidence. When that is removed there really is no circumstance which can be taken as justifying

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the strong view which the Lord Chief Justice expressed in favour of the Appellants.

I therefore think that the judgment should be in favour of the Respondents.

Judgment complained of affirmed, and appeal dismissed with costs.

Lords' Journals, July 16, 1877.

Solicitors for the Appellant: *Tahourdins & Hargreaves.*
Solicitors for the Respondents: *Burchells.*

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June 28, 29; *July* 2, 23.

HARVEY BATHURST AND WILLIAM GEORGE CRAVEN . . . . APPELLANTS;

AND

SIR JOHN ERRINGTON, BART., AND OTHERS RESPONDENTS.

Will—" Become the Eldest Son."

12 Ch. D. 172-3-4 Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result.

The rule stated in *Abbott* v. *Middleton* (1) adopted.

A testator, *E.*, devised his estates to *R.* the second, *J.* the third, and *C.* the fourth sons of his brother-in-law Sir *T. S.* (entirely passing over *W.*, the eldest son), and to their sons successively in tail male. By a name and arms clause he directed that as any one became entitled under the will he should assume the name and arms of *E.* He then introduced a shifting clause, that in case *R.*, or *J.*, or *C.* "should become the eldest son" of Sir *T. S.*, the *E.* estates should go over to the next in remainder under his will. The testator died in 1819. Sir *T. S.* survived the testator. *W.* the eldest son, succeeded his father in the *S.* baronetcy, and in the paternal estates; and disentailed and sold them. On his death without issue *R.* succeeded to the baronetcy. He had long before complied with the name and arms clause in the testator's will, and was in possession of the *E.* estates. *R.* died without male issue, and *J.*, the third son, then claimed the *E.* estates:—

Held, that he was entitled to them, for that upon the true construction of the will he had not "become the eldest son" of Sir *T. S.*, and the shifting clause had therefore not taken effect.

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(1) 7 H. L. C. at p. 89. 5 Jur. N.S. 717

Per THE LORD CHANCELLOR (Lord *Cairns*):—The eldest son of a man is his first-born—the *primogenitus*; and the words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the lifetime of that person; they are connected with the heirship of, and right of succession to, a living man.

Per LORD SELBORNE:—In order to give a different construction to the will, the word "surviving" would require to be introduced between the word "eldest" and the word "son."

THESE were suits instituted for the purpose of obtaining a decision on the construction of certain clauses in the will of *Henry Errington*, Esq, of *Sandoe*, in the county of *Northumberland*, and of *Red Rice*, in the county of *Hants*, who died in the year 1819.

The testator was connected, by the marriage of his two sisters, with the families of *Fermor* and of *Stanley*. He gave all his estates in the county of *Northumberland* to Sir *John Throckmorton* and Mr. *Bernard Edward Howard* (afterwards Duke of *Norfolk*) as trustees to the use of *Richard Fermor* (the third of the sons of Mrs. *Fermor*) for life, and to his first and other sons in tail male, remainder (passing over *William*, the eldest son of Sir *Thomas Stanley*) to the use of *Rowland Stanley*, the second son of Sir *Thomas Stanley*, of *Hooton*, in the county palatine of *Chester*, Bart., for life, remainder to trustees to preserve, &c., remainder to the use of the first and other sons of *Rowland Stanley* successively in tail male, remainder to the use of *John Stanley*, the third son of Sir *Thomas Stanley*, for life, remainder to trustees, &c., remainder to the first and other sons of *John Stanley* successively in tail male, remainder to *Charles Stanley*, the fourth son of Sir *Thomas Stanley*, for life, remainder to trustees, &c., remainder to the first and other sons of *Charles Stanley* successively in tail male, with an ultimate remainder to the testator's right heirs.

The will contained the following clauses:—"And I do hereby require and direct that the said *Richard Fermor*, *Rowland Stanley*, *John Stanley*, *Charles Stanley*, and every other person who, by virtue of the devise hereinbefore contained, or of this proviso, shall become entitled to the possession or to the receipt of the rents and profits of the estates hereby devised, shall and do, within the space of one year next after they shall respectively so become entitled to the possession, or to the rents and profits of the said estates, take upon him and them respectively, and use in all deeds, letters, and writings, the surname of *Errington* only, and no other surname, and take and bear the arms of *Errington* only, and no other arms, and shall and do within the space of one year next after they shall so respectively become entitled as aforesaid sue for and apply and endeavour to obtain" an Act of Parliament for these purposes. And "in case any such person or persons shall refuse or neglect to take such surname and arms," and to use the means requisite to enable him to do so, "the devise hereinbefore contained to the use of him or them so neglecting or refusing shall cease, determine, and become utterly void." And the said estates were, in such cases, immediately to go to the persons next beneficially entitled "in remainder under the devises hereinbefore contained" as if the persons whose estates should so cease had died without issue male.

Then came the following shifting clause, on which the question of construction was raised: "And I do hereby declare it to be my will that in case the said *Rowland Stanley*, or *John Stanley*, or *Charles Stanley* shall become the eldest son of the said Sir *Thomas Stanley*, then and in such case, and so often as the same shall happen, the estates hereinbefore devised to him so becoming the eldest son of the said Sir *Thomas Stanley*, and the remainder to the first and other sons of his body, shall cease, determine, and become void, as if he were actually dead without issue male of his body, and then and thenceforth the estates hereby devised shall immediately go and remain to the use of such person or persons as, by virtue of the devises hereinbefore contained, would then be entitled as the person or persons next in remainder to the same estates in case such person so becoming the eldest son of the said Sir *Thomas Stanley* was then dead without issue male of his or their body or bodies, and the same person or persons shall in every such case be entitled to take the same estate and estates in the said premises hereby devised as he or they would have been entitled to take therein by virtue of this my will if such person so becoming the eldest son of the said Sir *Thomas Stanley* were actually dead without issue male as aforesaid."

The residuary personal estate was given for the purchase of other real estate to be settled to the uses of the will expressed as to the existing estates. *William Cruise* and *William Throckmorton*, of *Lincoln's Inn*, Esquires, were appointed executors.

Mr. *Fermor* died in the lifetime of the testator, without issue. The testator died in 1819, and *Rowland Stanley* became entitled on his death to the *Errington* estates. Sir *Thomas Stanley*, his first-born son *William Thomas Massey Stanley*, *Rowland* the second, *John* the third, and *Charles* the fourth sons, as named in the will, survived the testator. *Rowland* was then about ten years of age, and from that time was known as *Rowland Errington*.

In the year 1820 the Royal permission was obtained for *Rowland* to bear the name and arms of *Errington* only, and he entered into possession of the *Errington* estates. The personal estate of the testator, amounting to above £144,000 was, under the direction in the will, invested in the purchase of real estate to be settled as above described.

Charles Stanley, the youngest of the brothers, died in 1834 without issue.

Sir *Thomas Stanley* died in August, 1841, leaving *William T. S. M. Stanley* his first-born son, *Rowland* his second, and *John* his third son him surviving. *William* succeeded his father in the *Stanley* baronetcy and the *Stanley* estates, disentailed them, acquired complete dominion over them, and sold them, and applied the proceeds of the sale to his own purposes. He died in June, 1863, without having been married. *Rowland Errington* then succeeded to the *Stanley* title, and continued in possession of the *Errington* estates until his death in 1875. He died without male issue. *John* then succeeded to the *Stanley* baronetcy.

In June, 1875, bills were filed on behalf of the persons claiming as right heirs of the testator, praying that it might be declared that in the events which had happened they were entitled to the possession of the *Errington* estates under the testator's will. Answers were put in, and the causes were heard in the Chancery Division by the Master of the Rolls, who, on the 13th of March, 1876, pronounced judgment to the effect that *Rowland*, on the death of his elder brother Sir *William*, became the eldest son of Sir *Thomas Stanley*, that thereupon *John* became by virtue of the limitations entitled to the *Errington* estates for life subject to the provisions of the name and arms clause; that his estate determined at the end of a year in consequence of his not having complied with those provisions, and that thereupon the estates went over to the right heirs of the testator; that on the death of *Rowland, John* became, according to the true construction of the shifting clause, the eldest son of Sir *Thomas Stanley*, and that thereupon the right heirs became indefeasibly entitled in possession to the *Errington* estates.

In March, 1876, *John*, by deed (not having obtained either an Act of Parliament or the license of the Crown authorizing him to do so) assumed the name and arms of *Errington* only, and has since been so styled and designated.

Sir *John Errington* appealed against the decree of the Master of the Rolls, and the Court of Appeal (consisting of Lord Justice *James*, Lord Justice of Appeal *Baggallay*, and Lord Justice of Appeal *Bramwell*, who dissented) reversed (1) the decree of the Master of the Rolls. This appeal was then brought.

Mr. *Chitty*, Q.C., and Mr. *Badnall*, were for the Appellant *Craven*.

Mr. *Southgate*, Q.C., and Mr. *Bagot*, for the Appellant, *Harvey Bathurst*.

Mr. *Benjamin*, Q.C., Mr. *Kekewich*, Q.C., and Mr. *Wolstenholme*, for Sir *John Errington*.

Mr. *Davey*, Q.C., Mr. *Bagshawe*, Q.C., and Mr. *Smart*, for the trustees under the will.

Mr. *Chitty*, Q.C., and Mr. *Southgate*, Q.C.:—The question here really depends on the construction to be put on the shifting clause, but the name and arms clause will much aid the House in arriving at the proper construction. Now upon the name and arms clause it cannot be doubted that the *Errington* estates, which would have come to *John* when his elder brother *Rowland* succeeded to the *Stanley* title and estates, and so became disabled to hold the *Errington* estates, were forfeited by him through his neglect to take the name and arms of *Errington*. The clause distinctly inflicted the penalty of forfeiture for such neglect.

The Appellants were the right heirs of the testator, and as such became entitled to the estates devised by his will, all the events having happened which determined the particular estates of all the previous takers. The words of the will must be read in the ordinary sense as written: *Grey* v. *Pearson* (1). That rule had been previously declared in *Scarborough* v. *Savile* (2); and the construction of a shifting clause does not form an exception to it. So read, it was clear that *John Stanley*, now calling himself *Errington*, had, by the deaths of his elder brothers without male issue, "become the eldest son" of Sir *Thomas Stanley*, and as such was entitled, and had succeeded to his father's baronetcy, and was, so far as the words of family settlements provided, entitled to the *Stanley* estates. The will of Mr. *Errington*, the testator, therefore expressly excluded him from the enjoyment of the *Errington* estates. The observation in the Court below, that there could not be "an eldest son" unless he had younger brothers, was a simple mistake. It was contradicted by the case of *Tuite* v. *Bermingham* (3), where an only son was treated as the eldest son, and so the estates went from him, who, as an "eldest son," was excluded from their enjoyment, and they passed over to the devisees in remainder. *Harrison* v. *Round* (4) exactly supported this contention. The words there were should "become an eldest son," and the second-born son was held upon the death of his elder brother to have come within the operation of those words, and Lord Chancellor *St. Leonards*, though giving such effect to the words would be to defeat a vested estate, acted upon them, because, as he said (5), "the party who creates the estate has also a right to limit it over or to defeat it." The principle was acted upon in the case of *Biddulph* v. *Lees* (6). It may be admitted that the burden of shewing that this is the proper construction of the will lies on the Appellants, but that is a burden which, on the authorities applicable to this case, is easily discharged.

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(1) 4 Ch. D. 251, *nom. Bathurst* v. *Stanley*, and *Craven* v. *Stanley*

The rule that, when portions are to be divided, from the benefit of participating in which an eldest son is excluded, as in *Collingwood* v. *Stanhope* (7), the time for ascertaining who fills the

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(1) 6 H. L. C. 61. 3 Jur. N.S. 823.
(2) 3 Ad. & E. 897–962.
(3) Law Rep. 7 H. L. 634.
(4) 2 D. M. & G. 190. 17 Jur. 563.
(5) Ibid. 201. 17 Jur. 536.
(6) El. Bl. & El. 289. 4 Jur. N.S. 508.
(7) Law Rep. 4 H. L. 43. 5 Ch. 818.

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character of eldest son is the period fixed for the distribution of the fund, does not affect the present case, for there only one period of time can be referred to, while here the will refers to several periods, and declares what is the intention of the testator when and "so often" as the event he has provided for shall happen; and in *Collingwood* v. *Stanhope* Lord *Westbury* (1) expressly remarks on the distinction between cases of portions and cases of shifting clauses. The father's death cannot affect the question of a son becoming an eldest son: *Lord Teynham* v. *Webb* (2). There the father died leaving two sons: the elder died four years after him; the younger became thereby the successor to the *Teynham* title and estates, and was treated as the eldest son. [LORD SELBORNE:—That was the case of a settlement, and the son who was said to become the eldest son was provided for by succeeding to the paternal estates.] That does not create a substantial difference. In *Matthews* v. *Paul* (3) the second son who by the death of his elder brother had become the eldest, was held not entitled to a share of the stock given to the younger children, although an estate limited to his elder brother did not descend to him. It is admitted, however, that that is a case of the class of portions cases. And that was the explanation of the decision in *Theed's Trusts* (4). But where all the matters provided for by the will have happened the result directed by the will must follow. That is the case here. In *Meyrick* v. *Laws* (5) the shifting clause did not take effect, because the events contemplated by the testator had not happened; here they have happened, and happened as he contemplated, and consequently the shifting clause ought to have full effect. There is great danger in introducing into such cases as the present, the consideration whether the settled estates do entirely, or partially, or not at all, come to the possession of the younger son who, by the course of events, has become the eldest son as pointed out by the testator; and in *Livesey* v. *Livesey* (6), though the second son who had become the eldest son did not succeed to the estates which had been provided for his elder brother, it was held that as by the death of his elder brother he had become the eldest son, he was excluded from the share which otherwise he would have taken in the residue.

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(1) Law Rep. 4 H. L. 57.

(2) 2 Ves. Sen. 198.

(3) 3 Sw. 328; 2 Wils. 64.

(4) 3 K. & J. 375; 26 L. J. (Ch.) 514.

(5) Law Rep. 9 Ch. Ap. 237.

(6) 2 H. L. C. 419.

Mr. *Benjamin*, Q.C., and Mr. *Davey*, Q.C.:—If the will is construed so as to give effect to the real intention of the testator this decree must be affirmed. It may be admitted that he did not desire to see the *Stanley* estates and the *Errington* estates united in one person, but he never intended that, in any event which might happen, the person in whom the *Errington* estates had become vested should be divested of them merely because he might succeed to the *Stanley* baronetcy, although he did not succeed to the *Stanley* estates. He speaks only of becoming the eldest son, which must have reference to the estates that the eldest son would be expected to possess. Although in terms he does not mention those *Stanley* estates he must have meant to refer to them. His real desire was to found an *Errington* family, not to have the *Errington* estates so divided that no such family could be founded. The contention on the other side, if successful, would have this effect, that a person might have taken the *Errington* estates, assumed the name and arms of *Errington*, and then merely because he became entitled to the title of the baronetcy of *Stanley*, the *Errington* estates should go from him and pass to strangers. This could never have been intended, and to give such an effect to the will would really be to defeat the intention of the testator, who never could have meant that such a strange result should take place.

A man cannot become the eldest son of his father many years after his father's death. He may be said under certain circumstances, and in certain respects, to have come into the position of his eldest brother, but he has not become the eldest son, and he cannot even be said to have come into the position of the eldest son unless he succeeds to all the advantages which that eldest son possessed. As is pointed out by Lord *Cairns* in *Collingwood* v. *Stanhope* (1), the one child who takes the bulk of the estate is he alone who is prevented from participating in the general provision made for the benefit of children. That principle, as his

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(1) Law Rep. 4 H. L. 43, 61, 63.

Lordship remarked, had been acted upon so long ago as in *Duke* v. *Doidge* (1). The case of *Matthews* v. *Paul* (2) did not contradict that principle. It was the status of the person which was to be considered, and no one could say that Sir *John Errington* here had succeeded to the status of his eldest brother, for that brother had held the *Stanley* family estates, which alone the testator had desired to disconnect from the *Errington* estates, but the Respondent here had no connection with the *Stanley* estates, but was in the position in which the testator had desired him to be for the purpose of founding an *Errington* family.

Mr. *Chitty* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

In construing the will of the testator, *Henry Errington*, which was was made so long ago as 1814, devising property of considerable value, which I will afterwards call the *Errington* estates, it is necessary that we should put ourselves, as far as we can, in the position of the testator, and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed. He was at the time a childless man of upwards of seventy years of age. His eldest brother was also childless. He had had a sister, Mrs. *Fermor*, who had left several sons alive, and of full age at the date of the will. His grandniece, the granddaughter of another sister, had, about nine years before the date of the will, married Sir *Thomas Massey Stanley*, of *Hooton*, and had at the date of the will four sons: *William*, *Rowland*, *John*, and *Charles*, aged respectively seven years, five, four, and one. The state of the family of his grandniece must have been well known to the testator, for he mentions correctly the names and the order of the birth of her second, and of her younger sons, infants as they were. The *Stanley* baronetcy was an old one, Sir *Thomas Stanley* being the ninth baronet; and the testator describes him by full and apposite words, and connects the name with the family estate of *Hooton*, in the county palatine of *Chester*. There is no distinct evidence, on the face of the will or otherwise, that the testator knew the value of the *Hooton* property, or the specific manner in which it was entailed; but it is impossible not to be convinced that the testator who knew so much about the family of Sir *Thomas* and Lady *Stanley*, knew also that which was almost a matter of common knowledge, that the baronetcy had descended and was then connected with the enjoyment of a family estate of considerable value.

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(1) 2 Ves. Sen. 203, n.

(2) 3 Sw. 328; 2 Wils. 64.

Under these circumstances the testator made his will. He does not provide for all the children or all the sons of his sister, Mrs. *Fermor*, or for all the children or all the sons of his grandniece, Lady *Stanley*. He singles out one of the *Fermors* as the only object of his bounty; and he passes over the eldest son of Lady *Stanley*, and takes no notice of what was, at the time, a high probability, that she would have sons thereafter born. He devises his estates to *Richard Fermor*, the third of the *Fermor* sons, for his life, with remainder to his first and other sons in tail; and for default of such issue to *Rowland Stanley*, the second son of Sir *Thomas Stanley*, for his life, with remainder to his first and other sons in tail; with remainder to *John Stanley*, the third son for life, and to his first and other sons in tail; with remainder to *Charles Stanley*, the fourth son for life, with remainder to his first and other sons in tail, with remainder to his own right heirs for ever.

He then provides that in case *Rowland*, or *John*, or *Charles* should "become eldest son of Sir *Thomas*," then, and in such case, and so often as the same should happen, the estates devised to him so becoming the eldest son of Sir *Thomas*, and the remainder to the first and other sons of his body, should cease, determine, and become void as if he were actually dead, without issue male of his body, and that then and thenceforth the devised estates should immediately go and remain to the use of such persons as by virtue of the devises thereinbefore contained would then be entitled as the persons next in remainder to the same estates, in case such person so becoming the eldest son of Sir *Thomas Stanley* was then dead without issue male of his body.

It is as to the meaning of this clause that the question has arisen.

The testator died in 1819. *Richard Fermor* died a bachelor in the testator's lifetime, and therefore, on the death of the testator, *Rowland Stanley* entered into possession of the *Errington* estates. Sir *Thomas Stanley* died next, in 1841, his son *Charles* having died in his lifetime. Then *William*, his eldest son, died unmarried in 1863. Then *Rowland Stanley* died in 1875, and *John Stanley* (now the Respondent Sir *John Errington*), became the baronet, and the only surviving son of Sir *Thomas*.

It should be added to what I have already said, that the will contained a name and arms clause requiring every person becoming entitled to the possession of the *Errington* estates, within one year, to take the name and arms of *Errington*, and to endeavour to obtain an Act of Parliament or license from the Crown to enable him so to do, declaring that if this was not done the devise to him should be utterly void, and the estates go over to the person next beneficially entitled in remainder.

It is contended on behalf of the Appellants, that on the death of *William*, in 1863, *Rowland* became the eldest son of Sir *Thomas*, within the meaning of the shifting clause, and that thereupon *John* became entitled to the possession of the devised estate, but that, as he did not take the name and arms of *Errington* within a twelvemonth, his estate ceased; and farther, that on the death of *Rowland*, in 1875, the Respondent, *John*, became the eldest son of Sir *Thomas*, within the meaning of the shifting clause, and that thereupon the *Errington* estates went over to the heirs-at-law, who are the Appellants. The Respondent, Sir *John*, on the other hand, contends that *Rowland* never became, and that he (*John*) never became the eldest son of Sir *Thomas* within the meaning of the clause, and that therefore the *Errington* estates remained vested in *Rowland*, and on the death of *Rowland* without issue male, came to the Respondent *John*, and are now vested in him; and he has been, and is now in possession of the estates.

The Master of the Rolls adopted the construction of the shifting clause contended for by the Appellants, but his decree was reversed by the Court of Appeal. Lord Justice *Bramwell*, however, dissenting from the opinion of the majority, which consisted of Lord Justice *James* and Lord Justice *Baggallay*, the bills filed by the Appellants were, in the Court of Appeal, dismissed with costs, and, in my opinion, that decision ought to be affirmed.

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It is impossible to interpret the shifting clause according to the literal meaning of the words. The eldest son of a man is his first-born, the *primogenitus;* and in this sense, *Rowland, John,* or *Charles,* never could become the first-born or *primogenitus,* of Sir *Thomas Stanley,* for *William,* as was well known to the testator, was in this sense his eldest or first-born son. Hence the Appellants are therefore obliged at the outset to admit that, according to their construction, they must insert the word "surviving" after the word "eldest," and must read the clause as if it ran, "In case *Rowland, John* or *Charles,* shall become the eldest *surviving* son of Sir *Thomas.*" It is possible that, with a context harmonizing with this construction, the words "eldest son" may have this meaning; but it is obvious that where they have this meaning the word "eldest" does not describe the status of the son, with reference to his father, so much as it does his status with reference to his brothers, and the expression is, in fact, the same as if it ran, "the eldest of the surviving sons of Sir *Thomas.*" The Respondent contends that the words "become the eldest son of Sir *Thomas,*" indicate a son who should become what *William* was at the date of the will, that is to say, an eldest son, who was also heir apparent of a living father, and there is no doubt that, if the context harmonizes with this idea, the words used are capable of this construction also.

It being, then, impossible to read the words, "the eldest son," according to their primary and literal meaning, and the words "become the eldest son" being ambiguous and capable of two significations, upon what principle is the Court to determine which of the two ambiguous significations is to be adopted?

The rule upon this subject was happily expressed by Lord *Cranworth,* in the case of *Abbott* v. *Middleton* (1) in this House, in words which have been more than once referred to: "Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the con-

(1) 7 H. L. C. at p. 89. 5 Jur N.S. 719

struction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."

Applying that rule in the case before us, and assuming for the present that the two constructions of the words which I have mentioned are in themselves equally accurate, let us see which of the two constructions will best satisfy the test which Lord *Cranworth* has thus proposed.

The testator could have had no *personal* motive for preferring the younger sons of his grandniece to the eldest, or for making their interests cease or determine at any particular time, for they were, as I have said, all of them in their earliest infancy. The exclusion of the eldest and the provision for shifting the estates from time to time, must therefore have been made with reference to the devolution or possession of some other estate or some title. It is on this footing, and in reference to such events, that, so far as we are acquainted with the habits of testators, a shifting clause is, without any instance that I am aware of to the contrary, introduced into wills. The testator had before him the *Stanley* baronetcy, and some knowledge at all events of the *Hooton* estate connected with the baronetcy. It appears to me to be not material that he is not shewn to have known the particulars of the settlement of the *Hooton* estate. It may be taken, although it is highly improbable, that he knew no more than the fact that the baronetcy was an ancient one, and that its holder occupied the position of a man of property in his county. He would be content to assume that this would continue to be the case, and that the heir of the baronetcy would need no farther or separate endowment. He might have given his property to *William*, the eldest son, making it shift if and when he became the baronet ; but in place of doing so he appears to assume that *William*, as the eldest son and heir apparent of his father, will be provided for by his father even in his lifetime; and therefore, passing him over, he appears to assume that any other son becoming in his father's lifetime what *William* then was will be provided for by his father as *William* would be provided for. In this way a shifting of the estates will take place exactly answering to the supposed object, and likely to continue for a considerable time while Sir *Thomas* lived and the three sons mentioned were growing up.

If, on the other hand, the construction of the Appellants is adopted, there is attributed to the testator a scheme of disposition not merely capricious, not merely disastrous to the objects of his bounty, but one which, in the words of Lord *Cranworth*, is absolutely without any intelligible motive. The estates would shift without any reference to the devolution of the title, or of any property supporting the title. If all the persons were to die according to the order of their ages, events which a testator generally inclines to suppose, the estate would go from son to son, and finally over to the collateral heirs, although all the sons in succession might leave large families of sons and daughters. The *Stanley* baronetcy and the *Hooton* estate might have come down from Sir *Thomas* to *William*, who might have many sons, to whom they would afterwards descend; and then, *William* dying, *Rowland* would, according to the Appellants, become the eldest surviving son, and the *Errington* estates—the only means, it may be, of support of himself and his family—would thereupon go over, leaving him and them absolutely destitute, and that for no reason and on no principle that could be understood or could be even suggested.

Supposing therefore the words to admit of two constructions, equally accurate grammatically, it would be our duty to adopt the construction which would avoid the anomalies to which I have referred, even supposing that construction were not the most obvious one. But I am bound farther to say that I do not think the words "shall become the eldest son" of a person living at the date of the will, are words which, unless controlled and explained by a context, extend in their operation beyond the lifetime of that person. I agree on this point with the general observations of Lord Justice *James*. I do not think that without an explanatory context explaining and forcing the construction, a man is, by the death of his elder brother, said to become the eldest son of his father after his father's death. I think the words "become the eldest son," in their natural and ordinary meaning, point to the attaining a status perfectly well known and well understood, and connected with heirship of, and right of, succession to a living man.

For these reasons, which have been so fully expounded in the judgments in the Court of Appeal that I do not think it necessary to dwell farther upon them, I submit to your Lordships that these appeals should be dismissed. With regard to the costs, there is no trust to be executed and no direction to be given requiring the intervention of the Chancery Division of the Court. The suit is in reality an action by the persons out of possession against a person in possession, undertaking to shew that his possession is wrongful. If they had succeeded, they would have been entitled to succeed with costs, and in like manner failing, I think they must fail with costs to be paid by them.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion as that which has been expressed by my noble and learned friend on the woolsack.

I think that any one looking to this will must see at once that there were two objects which presented themselves very strongly to the testator's mind. The one, that of either the founding or the continuation of a family of the name of *Errington*, and the other that that name should, at all events, not be confounded with the name attached to a family holding otherwise considerable possessions, in which also there was a baronetcy connected with the name of *Stanley*, with which they held those possessions. He was not desirous that the name of *Errington* should be confounded with that of *Stanley*, but wished it to be kept clear and distinct throughout.

As regards his first devise of the estates to the third son of his niece, who was named *Fermor*, we have nothing very definite to shew that he desired in any way to alter or limit that gift which he had made to the *Fermor* family, in any circumstances that might happen in the shape of accretion of estates or property to the *Fermors*. But even as regarded the *Fermor* family, he subjected Mr. *Fermor*, the first taker, to what is usually called the name and arms clause, which required him to assume the name of *Errington*, so far corresponding with his wish which, as I said before, evidently was to perpetuate that name in connection with the estates bestowed by his bounty.

Having done that, he proceeds to consider the farther devises in the event of *Richard Fermor*, the third son of his niece, dying without leaving any issue male; and then he gives the property in this way: "For default of such issue to the use of *Rowland Stanley*, the second son of Sir *Thomas Stanley*, of *Hooton*, in the county palatine of *Chester*, baronet." In addition to the remarks which have been made by my noble and learned friend on the woolsack as to the certainty of this testator being aware of the existence of the *Stanley* baronetcy, and of the connection of that baronetcy with the old family estate of *Hooton*, it is not unworthy of observation that the old family baronetcy, dating from 1661, was bestowed upon a certain *William Stanley*, who is described as "*William Stanley*, of *Hooton*, in our county of *Chester*." At the time, therefore, of the testator making his will, the baronetcy and the estates had been connected for upwards of 150 years, this will being made in 1814. Well, my Lords, it appears to me that he was anxious, even in the case of the devise to the *Fermors*, that the name of *Errington* should be perpetuated in connection with the estates; but here, when he arrives at these devisees—the children of his great-niece—whom he wishes to be the next objects of his bounty, he carefully provides, in the first instance, that the estates shall not be commingled with the *Stanley* estates and the *Stanley* baronetcy, by selecting the second son out of those four sons who were then born to Sir *Thomas Stanley*. He takes care that the eldest son, to whom in the natural course of events the *Stanley* estates and baronetcy would descend, shall not be the possessor of the estates which are thus given by his will. In order to take care of that, when he names the sons of Sir *Thomas* he omits *William*, the eldest, altogether from any bounty under his will, and proceeds to *Rowland* the second son. He names him, and he names *John*, the present Sir *John Errington*, and he names *Charles*, who seems to have died before his elder brothers; and having proceeded through those three, limiting estates for life, with remainders in tail to those three several members of the *Stanley* family, he then, in the event of all failing, carries over the property to the several persons now claiming at your Lordships' bar, who are his heirs-at-law.

Then comes the clause shifting the use in the event which is there mentioned, and which has given occasion to this litigation. He declares:—[His Lordship read the clause.]

Now, my Lords, if we are to adopt the construction contended for by the Appellants, we do really arrive at a will so singular and so whimsical in itself, that nothing but the necessity of clear and explicit words so directing would justify your Lordships, I think, in coming to the conclusion that that interpretation contended for by the Appellants ought to be assigned to the devise, unless in the least probable of all the events which might happen, namely, that *William*, the eldest son, should happen to survive all his three brothers, *Rowland*, *John*, and *Charles*, it would be impossible, according to the Appellants' construction, for the estate to remain in any of the devisees to whom the testator had bequeathed it. If *William* survived them all, it might be said that none of the three others, according to the construction then given, would become "the eldest son," for he would remain the eldest until the last. But in the event of his death, according to the Appellants' construction, long after the father, Sir *Thomas's* death, every one of those three in succession might become "the eldest son" of Sir *Thomas*. What the succession might be does not signify, whether *Charles* died first, or *Rowland* died first, or *John* died first, still they would come into possession of the estates in the order of their succession as mentioned in the will, that is to say, in the order of birth; but there must be a survivor of them. *William*, the eldest son, is out of the question by the hypothesis, namely, that he is dead before the other three, and accordingly not a possibility remains but that each person coming into possession must become "the eldest son," unless indeed he is taken off by death, so that it goes to his children. Now, my Lords, the scheme I have thus described is one of the most unnatural that it is possible to conceive. Farther than that, however, this might be, that when the one came into possession of the estate, whether it was *Rowland*, *John*, or *Charles*, he might die leaving numerous issue, and those issue, if he died before them, might take the estate. I will take the case of *William*, the eldest, first. If *William* dies leaving issue, those issue would have the full benefit of the *Stanley* estates. They would have become the baronets, having possession of the estate of *Hooton ;* but the next son, *Rowland,* taking the *Errington* estates, would, as soon as he came into possession of them, find himself deprived of them on *William's* death, although at the same time it would be impossible for him to take the *Stanley* estates, or to take the baronetcy which came through the name of *Stanley.* That condition of things seems to me one of the most unnatural that can be conceived.

Now, my Lords, what is the actual wording of this clause? It is when they "shall become the eldest son." As has been already observed, that is an interpretation in which you must introduce some idea not expressed accurately in language by the words which are used, because as far as the words used are concerned they denote an impossibility, because a son, who is at any time second son, and as to whom that fact is ascertained, could never become the eldest. We must, therefore, give such a meaning as can be best given to a will which is inaccurately worded. The meaning which appears to me most adequately to meet all the intentions apparent on the face of the will, namely, the keeping the *Errington* estates separate from the *Stanley* estates and the baronetcy, and taking care that they shall go in devolution as *Errington* estates as long as the law will permit, I say the interpretation which is the most natural to adopt for that purpose is to read it thus: In the event of the one who takes the *Errington* estate coming exactly into the position of that eldest son who has been excluded by the testator, becoming (that is to say) the heir apparent of Sir *Thomas,* who lived long after the testator's death, (and died in 1841), if at any time thereafter any one of the three younger brothers should occupy the position of him whom I have already excluded by my bequest, as being the heir apparent of Sir *Thomas Stanley,* of *Hooton,* then and in that case becoming eldest son in that sense I desire the estates to go over.

My Lords, the learned Lord Justice (Lord Justice *Bramwell*) who differed from the majority of the Court of Appeal in the decision which was come to in the Court below, puts the case in this way, and I need hardly say that to everything he says I always look to with the greatest attention, and give the greatest possible

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consideration. He says that the question is not "what is the meaning of the words 'become eldest' and 'son' in themselves, it is what is their meaning in conjunction, and as the testator has used them. 'Eldest son' may mean one thing abstractedly, and another thing in conjunction with other words. If nothing else appeared, I should say that 'eldest son' meant 'the eldest born.' Here it does not mean that, because it supposes that each and all of the four sons may be 'eldest.' If any one said"—(this illustration appears to me to mark a most incorrect view to take of this will)—"if any one said that *William* IV. was the eldest son of *George* III., he would not only use careless and inappropriate language, but would convey a wrong idea to his hearer. If he said that on the death of *George* IV. *William* IV. became the eldest son of *George* III., and as such succeeded to the throne, his language might be inaccurate, critically or hypercritically considered, but it would convey no erroneous idea to the hearer." But, my Lords, mark what the learned Lord Justice introduces as a supposition, and as an explanation of the term "become the eldest son," in this will. He supposes a person to be telling another that *William* IV. became the eldest son of *George* III., and as such succeeded to the throne. If in this case *Rowland* had in the lifetime of his father become in that sense the eldest son, and had come into the position of *William,* so as to succeed to the *Stanley* baronetcy immediately on the death of the father, then the illustration put by Lord Justice *Bramwell* would apply. But the case before us is this, that it is not a succession to the father, but a succession through the brother, which brother, for aught the testator knew, might have full power of disposing of the estates, or might leave children who would succeed to the baronetcy and to the *Stanley* estates.

What I apprehend is the reasonable construction to give to a will of this kind is that which Lord Justice *Bramwell* seems to put, just in the same way as it was put by the noble and learned Lord on the woolsack in fact, and that is this: Place any one of my devisees in the position of the son *William,* whom I have excluded, make him become the eldest son as *William* is now the eldest son, that is to say, put *Rowland* or either of his brothers, *John* or *Charles,* in the position of being able, on the death of their father, Sir *Thomas*, to inherit the *Stanley* estates and the *Stanley* baronetcy, then and at that time their interests in the *Errington* estates shall cease. But in the events which happened they were never placed in that position. In the events which happened—the father surviving till 1841, and the testator dying in 1819—Sir *William* succeeded to his father in 1841, and held those estates till 1863. It is not necessary for me to say he actually alienated the estates; it is enough for me to say that he had full power to do so. Therefore Sir *Rowland Stanley* never did come into the position of being the eldest son of his father at a period when it would be of avail, that is to say, when, by the death of the father, he would enter at once into the possession of both the *Stanley* baronetcy and the *Stanley* estates.

I think my Lords that the true meaning of the testator in this will may be found by carefully considering the prevailing and ruling intent throughout, namely, that the *Errington* estates shall remain, *quâ* the *Errington* estates, as a distinct inheritance, separate from the *Stanley* estates and the *Stanley* title. In the circumstances which have happened he has not provided for that by using the words "become the eldest son," unless he means have become the eldest son at the time the father dies, and when the relation of heirship ceases. I think nothing in this will can be extended to the case of a succession to a brother, who might have parted with the whole of the estates connected with the *Stanley* title, and from whom therefore nothing would come to Sir *Rowland*, who on the one hand would lose the *Stanley* estates, and on the other hand would, according to the construction of the Appellants, see the *Errington* estates pass over to others, although he might be found to be in truth in the very position in which the testator would have wished to place him, namely, the founder of an *Errington* family, which I apprehend to have been the chief intent and purport of the testator.

LORD SELBORNE:—

My Lords, successive life estates, with remainders to their respective male issue, are by this will limited to *Rowland*, *John*, and *Charles*, the three younger sons living at the date of the will of a living father, described on the face of the will as "Sir *Thomas*

Stanley, of *Hooton*, in the county palatine of *Chester*, Baronet," who was well known to the testator, having married his great-niece. All the children of Sir *Thomas* were then infants of tender years. No estate is given, either to Sir *Thomas* himself or to his eldest son and heir apparent, named *William*. There were in the will prior limitations to a nephew of the testator of another family and his male issue, but that nephew died without issue in the testator's lifetime. Subject to the estates so given to *Rowland*, *John*, and *Charles*, and their issue, the ultimate limitation was to the testator's own right heirs.

Sir *Thomas Stanley* was, and was known to the testator to be, the owner in possession of a large family property, including his place of residence at *Hooton*. Letters patent of King *Charles* II., by which the baronetcy was created immediately after the Restoration, are in evidence. The first baronet is there described as *William Stanley*, of *Hooton*, in the county of *Chester*, Esquire, a man respected for his family, patrimony, estate, &c. If Sir *Thomas* had been understood by the testator to be the owner in fee simple of the *Hooton* property, it would have enabled him to provide in a suitable way for those who might succeed him in the family honours; and it would, even in that case, have been natural for the testator to presume that he would do so, inasmuch as it is not suggested that he was of such habits or character as to make it probable that he would dissipate his patrimony. In point of fact, however, the *Hooton* property had been settled upon the marriage of Sir *Thomas* with the testator's grand-niece, in the usual manner, viz., upon Sir *Thomas* for life, with remainder to his first and other sons in tail male. If it were necessary I should be much disposed to think that, in the absence of evidence to the contrary, this settlement of the property, though not referred to in the will, might be assumed to have been known to the testator, but it is sufficient to say that he may at least be supposed to have contemplated the probability that a settlement of some such nature had been or might be made, and under these circumstances, whether he knew of the actual settlement or not, he might well regard an eldest son and heir apparent of Sir *Thomas Stanley* as sufficiently provided for, both in his father's lifetime and afterwards.

These are all the facts which seem to me material to the construction of the shifting clause in the will, under which the devised estates are, in the event of any one of the three sons of Sir *Thomas*, who are successively made tenants for life, "becoming the eldest son of the said Sir *Thomas Stanley*," and "so often as the same shall happen," to go over in the same manner, as if such son were, at the time of such event happening, dead without issue.

The Appellants contend, that the effect of this shifting clause is the same as if the testator had directed the estates to go over, in the event of any one of the devisees for life surviving his elder brother, if only one, or all his elder brothers, if more than one; and that *toties quoties.* The Respondent, on the other hand says, that the phrase, "eldest son," is in this clause equivalent in its effect to a son who should be his father's heir apparent. The Master of the Rolls and Lord Justice *Bramwell* adopted the construction of the Appellants. Lords Justices *James* and *Baggallay* that of the Respondent. I agree with the Lords Justices from whose order this appeal is brought.

It being common ground that the word "eldest" cannot here mean "first-born," the Appellants introduce the word "surviving" between "eldest" and "son," and so make the "eldest son of the said Sir *Thomas Stanley*" to mean "the eldest survivor of the sons of the said Sir *Thomas Stanley*." But the Respondent denies that it is either necessary or right so to imply the word "surviving" between "eldest" and "son." He asserts that the words are sensible as they stand, without any addition or alteration, because there is a common and well understood sense in which a younger son, succeeding to the status of the first-born, with respect to rights of primogeniture in his father's lifetime, does actually, upon the happening of that event, "become the eldest son" of his father; and he says that the intention of the testator, as it is to be collected from this will, was to exclude any son of Sir *Thomas Stanley* who might at any time during the life of Sir *Thomas* possess that status, passing over the first-born son (who necessarily possessed it) and his issue in the first instance; and by the shifting clause, treating any other son, who might afterwards come into the position of the first-born, in the same manner as the first-born himself had been treated. The will so interpreted proceeds upon a consistent scheme, and only excludes such sons (with their families) as might reasonably be assumed to be otherwise provided for. On the other hand, according to the Appellants' construction, its operation is quite arbitrary, making the exclusion of the younger sons to depend on the mere accident of the relative duration of their own and their elder brothers' lives, without any consideration whatever of the probability or improbability of their being in any way provided for; and involving their respective lines of male issue in the same misfortune, though in the name and arms clause an intention is rather anxiously manifested not to forfeit the estates of issue for their parents' fault.

It appears to me that the construction of the Respondent is not only the more reasonable, but is also the more strict and literal. One test of this is, to consider in what events (if any) the very words used in this clause, "the eldest son of Sir *Thomas Stanley*," might have been properly employed in a deed, will, or other instrument, to describe one who was originally a younger son. If any event might have happened, in which such a person might properly have been so described, and if another event has actually happened in which this could not be done, then it follows that in the former case he would have "become the eldest son of the said Sir *Thomas Stanley*" in a sense not requiring the introduction of the word "surviving" between "eldest" and "son;" in the latter he has not. Now it appears to me clear that if *Rowland* had, in Sir *Thomas Stanley's* lifetime, become his father's heir apparent by the death of his brother *William* without issue, he might, without any deviation from the common use of language, have been thenceforth, during his father's life, described in deeds, wills, and other instruments, as "*Rowland*, the eldest son of Sir *Thomas Stanley*, of *Hooton*, Baronet." And I think it is equally clear that if *William* had died, leaving male issue, *Rowland* could not (while the line of the first-born and his rights of primogeniture were still represented by the issue of the first-born) have been properly so described; nor could he, according to any known use of language, have ever been so described, if both the brothers had survived their father, and if *Rowland*, succeeding not to his father, but to his brother, had eventually become the baronet and head of the family, as he actually did.

It is to be observed that the words "become the eldest son of the said Sir *Thomas Stanley*" signify *primâ facie* a relation between son and father rather than survivorship between brothers.

The Appellants' construction deprives the mention of the father of all force, and reduces the whole to what a common clause of survivorship would more simply express.

These considerations might easily have yielded to any controlling context, or to any sufficient arguments founded upon reasonableness and probability of intention; but in this case there is no controlling context, and all the arguments founded upon reasonableness and probability of intention are in favour of the interpretation of the words which, in my judgment, is also the more strict and literal.

I concur, therefore, in the opinion that the order of the Court of Appeal ought to be affirmed.

LORD BLACKBURN:—

My Lords, I have come to the same conclusion. I have had the advantage of perusing the opinion of my noble and learned friend on the woolsack, and I have only to say, that I concur in his reasons without addition or alteration.

LORD GORDON:—

My Lords, I also concur; and, having had the same advantage as my noble and learned friend opposite (Lord *Blackburn*) of perusing the opinion which has been delivered by my noble and learned friend on the woolsack to the House, I feel very strongly in favour of the course which he has proposed, namely, that the judgment of the Court below should be affirmed.

The question has arisen with regard to the effect of one of those shifting clauses in entails which are, especially under the Act of 1685, more frequent in *Scotland* than in this country, and while in some cases which have come up before your Lordships' House on appeal, they have not been regarded as illegal, still, I think the view taken by Lord *Cranworth* is the correct one, namely, that they are not to be favoured, and that if you find that they lead to capricious results, you will adopt a construction which will get rid

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of the operation of the clause, but still give full effect to the intention of the testator. I think, in the present case, the citation of the opinion of Lord *Cranworth* clearly justifies the result which your Lordships have arrived at.

Decree appealed from affirmed; and appeals dismissed with costs.

Lords' Journals, 23rd July, 1877.

Solicitors: *Bonner; Gregory, Rowcliffes, & Rawle; Meynell & Pemberton; Few & Co.; Rashleigh & Smart.*

[HOUSE OF LORDS.]

ROBERT GARDNER . . . . APPELLANT;
MARY GARDNER . . . . RESPONDENT.

H. L. (Sc.)
1877
May 17.

Presumption of Paternity.

Where, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy,) hurry on their marriage to prevent, or to mitigate, scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of the husband's paternity to that child is next to insuperable.

Per THE LORD CHANCELLOR (1):—The presumption is not a *presumptio juris et de jure*, but a presumption of fact:—

Held, by the House, affirming the decision of the Second Division of the Court of Session, that the *onus* of establishing the husband's denial of paternity lay on himself, and that he had wholly failed to discharge that *onus*.

IN 1839, Mr. *Gardner*, a farmer near *Melrose*, proposed marriage to a Miss *Brodie*, but was then rejected. He afterwards went to *Australia*, whence he returned in 1846. Renewing his former courtship, Miss *Brodie* ultimately accepted him, she being then pregnant. They intermarried on the 29th of August, 1850. Seven weeks afterwards, on the 16th of October, 1850, the wife, Mrs. *Gardner*, was delivered of a female child, the above Respondent. Precautions had been taken to conceal the birth, and prevent scandal. The child was placed under the care of a nurse, Mr. *Gardner* paying all expenses, and arranging an allowance for the maintenance of the child. The girl attended the Free Kirk of the Rev. Mr. *Kay*, who, taking an interest in her, appealed to Mr. and Mrs. *Gardner* for their recognition of her as their daughter, but this they refused, deeming it desirable to conceal their antenuptial sexual connection, so as to enable Mr. *Gardner* to retain his position without impeachment as an Elder of the Church. He, however, placed the child in a school, paying all expenses, the girl addressing letters to him as "My dear father." In March, 1874, he proposed to allow her £40 a year, and to leave her £1000 at his death; but on condition that she would renounce all claim to be his daughter. She refused to accept this offer, declaring that the establishment of her legitimacy was the prime object of her life.

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(1) Lord *Cairns*.

In June, 1875, Mr. *Gardner* brought the present action, praying a judicial declaration that she was not his child; and asking that she should be ordered to desist from asserting that she was his child. The child, now a young woman, Miss *Mary Gardner*, put in her defence; and the case came before the Lord Ordinary (Lord *Craighill*), who, relying mainly on the oaths of the husband and wife, that there never had been sexual intercourse between them until after their marriage, gave judgment to the effect that *Mary Gardner* was not entitled to be considered the child of Mr. *Gardner*, although the unquestionable child of his wife.

Against this decision *Mary Gardner* reclaimed to the Second Division of the Court of Session, who held that Mr. *Gardner* had failed to make out his case, his own actings in marrying a woman whom he knew to be pregnant, and in not at once repudiating the child at its birth, raising a presumption which the evidence he adduced was insufficient to rebut (1).

Mr. *Gardner* thereupon appealed to the House, having for his counsel *The Lord Advocate* and Mr. *Darling* (of the Scotch Bar), who contended that the presumption *pater est quem nuptiæ demonstrant* did not apply where the child must necessarily have been conceived before the marriage. In this case there was the oath of the husband, and of the wife, both denying all sexual intercourse between them until after their marriage. The authorities relied upon are cited in *Brodie* v. *Dyce* (2).

Mr. *Trayner* (of the Scotch Bar), and Mr. *Alexander Robertson*, were heard for the Respondents, insisting that the Appellant had failed to prove his allegations. According to the law of *England* a man by marrying a woman whom he knows to be with child, acknowledges that the child is his own (3). The law of *Scotland* does not differ in this respect (4). The Appellant, by marrying

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(1) Fourth Series, vol. iii. p. 695.

(2) Nov. 29, 1872, 1 Macpherson, p. 142.

(3) *Rex* v. *Luffe*, 8 East, 207

(4) *Jobson* v. *Reid*, 8 Shaw, 343; *Morris* v. *Davies*, 5 Cl. & F. 363; *Lepper* v. *Brown*—case of a ripe child born five months after marriage, *Hume*'

Mrs. *Gardner* when he knew that she was pregnant; by not disclaiming the child born after the marriage; by assuming the burden of its maintenance and education without charging any one else with the paternity—these facts were of themselves amply sufficient to rebut the Appellant's attempt to displace the presumption of the Respondent's legitimacy (1).

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

My Lords, this case has been argued at your Lordships' Bar with very great ability. Everything which could be said for the Appellant has been said by the Lord Advocate and Mr. *Darling*. On the other hand, your Lordships have heard from Mr. *Trayner* an argument remarkable not merely for its point and strength, but what perhaps is more unusual, for its conciseness.

My Lords, the case itself is perhaps one of the most remarkable that has ever come before a Court in *Scotland*. The action is instituted by the Appellant for the purpose of "putting to silence" a claim made by the Respondent to be his daughter. The Lord Ordinary, before whom the case came in the first instance, gave effect to the conclusions of the summons, and gave the relief which was asked. On the other hand, the Judges of the Court of Session, upon a reclaiming note, were unanimously of opinion that the Appellant had failed to establish that he was not the father of the Respondent, and, therefore, they assoilzied the Respondent from the conclusions of the summons; and it is against that determination of the Court of Session that the present appeal is brought.

I will remind your Lordships very shortly of some of the matters which are so freshly in your Lordships' minds. The *onus* of proof in the case lies entirely upon the Appellant. He takes upon himself to establish the proposition that he is not the father

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Decisions of the Court of Session, p. 488; *Aitken* v. *Mitchell*, case of early birth and acknowledged intercourse before marriage, *Hume's* Decisions of the Court of Session, p. 489; Sir *Harris Nicolas's* Treatise on Adulterine Bastardy, p. 291, Case of the Earldom of *Banbury*.

(1) *Rex* v. *Luffe*, 8 East, 207.

(2) Lord *Cairns*.

of the Respondent; and if he does not establish that proposition he cannot succeed in obtaining the conclusions of the summons.

Now, my Lords, the history of the case may be conveniently looked at by dividing it into two parts; and in the first place I will remind your Lordships of those parts of the case as to which either there is no dispute, or they are established beyond the possibility of controversy. I will then place before your Lordships the parts of the case as to which there is controversy. There is no controversy about this: the Appellant and his wife, who is still alive, were married in the month of August, 1850; they had been acquainted for some years before the marriage; their courtship had continued for some years. The Appellant and the lady who is now his wife having been in the habit of associating together, she, a short time before the marriage, made a communication to him that she was pregnant. If during their intimacy any intercourse, in the technical sense of the word, had taken place between them, that communication might not have taken him by surprise. But that which was done was this: with his knowledge, and apparently with his concurrence, the lady went from *Tweedside*, where they were both living, to *Edinburgh* to consult Dr. *Thatcher*, a physician in *Edinburgh* of some note at the time. The physician told her, although according to her evidence she had herself little doubt before of the matter, that she was in the family way; and it appears that, being made aware that a marriage was contemplated, he suggested that the sooner the marriage took place the better. The result of the interview with Dr. *Thatcher* was communicated to the Appellant. He was not satisfied; but he himself went a day or two afterwards to see Dr. *Thatcher*; and heard from Dr. *Thatcher* that which the lady herself had heard. The Appellant says that he gave Dr. *Thatcher* to understand that he was not the father of the child. But, my Lords, I cannot take that as any statement which could be received that he had made to Dr. *Thatcher* any clear and distinct communication on the subject. In the absence of a clear and distinct communication, the circumstances of the case, the manner in which Dr. *Thatcher* was consulted, must have conveyed to the mind of Dr. *Thatcher* that the relations between the Appellant and the lady who had come to him were those which would have fixed the paternity of the child upon the Appellant. However, Dr. *Thatcher* seems to have told the Appellant, as he told the lady, that the marriage had better take place as soon as possible, and the marriage did take place in about six weeks, as I understand it, after this time, namely, in August, 1850.

The Appellant then took the lady to the farm where he lived—his own home; and about six weeks after the marriage, the time for her delivery being imminent, they both went to an *Edinburgh* hotel; the Appellant and the lady going there apparently not otherwise than as husband and wife; and on the morning they arrived the lady was taken with labour of childbirth. Dr. *Thatcher* was sent for, and the child was born. That is said to have been on a Tuesday; and on the Thursday the child was given to the care of a nurse, and taken away from the hotel. After some time the Appellant and the lady left the hotel, and apparently returned to their own home. From that time until the year 1872, a period of twenty-two years, neither of them saw the child—a girl. There is not very clear evidence as to what she was generally called, or what she was intended to be called; but, apparently from the circumstance that one of the garments, a plaid, which had been put around the child at first, having been marked with the name of "*Gardner*," that name seems to have gone with her, and more or less to have been the surname by which she was, occasionally at all events, called. The Appellant, however, regularly for a period of sixteen or seventeen years supplied through Dr. *Thatcher* the sum requisite for the maintenance of the girl; and the supply of that maintenance was discontinued when the girl was sixteen or seventeen years of age, not from any repudiation of the obligation to supply it, but because at that time it was the expressed opinion of the Appellant that she had come to an age when she might be able to support herself; and accordingly she appears to have supported herself by working in a manufactory. However, in the year 1872 having been led by circumstances, to which I need not refer, to suspect that the Appellant and his wife were her father and mother, the girl, who was then of the age of twenty-two, went to the place where they were resident, saw her mother, and introduced herself as her child, and apparently laid claim to both the Appellant and her mother as her parents.

My Lords, I pass rapidly over what passed during the succeeding three years. It is clear that at that time the claim being made by the girl to be the daughter of the Appellant as well as of his wife, that claim was in the first instance disputed; but there is this remarkable fact, that during those three years, there being repeated meetings with her, and she being placed by the Appellant in a school where her education might be improved beyond the point it had reached, the Appellant supplied during those years ample funds for her education and for her maintenance—funds amounting to between £120 and £130, it is said, in one year. A correspondence continued during that time in which he directs his letters to her by the surname of "*Gardner*," and she addresses him as her "father," or her "dear," or "dearest father"; and at one of those meetings which occurred, it must be remembered, whilst the controversy still continued as to whether he was or was not her father, it is admitted that he offered to portion her with a sum of £1000, payable at his death, and with an income in the meantime of £40 a year, and both were refused by her because not coupled with an acknowledgment of her as his daughter.

If the case rested there, and your Lordships had nothing more to deal with than the facts which I have stated, the marriage to a woman avowedly pregnant, and near the time of her delivery, by a man who had been courting her and keeping company with her; and her delivery taking place in the way I have mentioned, the child being provided for by the husband, although reasons for secrecy might easily be discovered, from the desire of preventing, at all events in the first instance, the scandal which might be occasioned among the connections of a married woman—still the facts which I have described would raise (I agree, with regard to Scotch law, not a presumption *juris et de jure*, but) a presumption of fact so strong that the man was the father of the child, that it would be extremely difficult to rebut or controvert it. Speaking of Scotch law only, and putting aside the much stricter presumption which in the case of English law would be drawn from those circumstances, I take the expression of Scotch law by Lord *Gifford* to be one which is accurate in itself, and which, indeed, was not challenged in the argument of this case. Lord *Gifford* says:

A certain presumption of paternity arises from the bare fact that a man knowingly marries the mother of an illegitimate child previously born. But this is a very weak presumption. In the absence of all other evidence, all that can be said is probably that it is more likely than not that he is the father. Such presumption would be greatly strengthened if previous to the marriage the mother of the illegitimate child had been the mistress or concubine of the man who afterwards married her, and had cohabited with him at or about the time of conception, and the adoption or acknowledgment of the child as his by the husband would probably make the presumption almost conclusive, though still capable of being rebutted by contrary proof. Where, as in the present case, a man marries a woman who at the time of marriage is in a state of pregnancy, the presumption of paternity from that mere fact is very strong, and is, perhaps, in almost all such cases, in entire accordance with the actual truth. Still further where the pregnancy is far advanced, obvious to the eye, or actually confessed or announced, as in the present case, to the intended husband, a presumption is reared up which, according to universal feeling, and giving due weight to what may be called the ordinary instincts of humanity, it will be very difficult indeed to overcome. The man who marries a woman in the condition in which Mrs. *Gardner* was on the 29th of August, 1850, the date of their marriage, when she was seven or eight months gone with child, says almost as emphatically as he could do by the most express words, I am the cause of the pregnancy and the father of the expected child (1).

Now, my Lords, having referred to what I have termed the facts of the case as to which there is either no dispute or no serious controversy, let me now remind your Lordships of the statements upon the other side brought forward for the purpose of getting rid of these facts. The statements are those of the Appellant and of the mother. They are statements which appear to depend entirely upon the evidence of the Appellant and the mother alone; and which cannot be directly and distinctly, at all events as to the material part of them, checked or controlled by opposite testimony. The material statement of the Appellant and of the mother, as to which there is the difficulty which I have referred to of checking their testimony, is this: they say that before marriage they never had carnal intercourse—that is the statement of both. They state, further, that before marriage, and immediately before the consultation with Dr. *Thatcher*, the lady told the Appellant that she had met on the moor, near her brother's house, some months before, a man whom she termed a low person or a blackguard, who had in substance violated her person; and she attributed to this cause her pregnancy in the

(1) Fourth Series, vol. iii. p. 721.

conversation which she had with the Appellant. That is her statement, and that is her husband's statement. She further states, and her husband states also, that about a year after the marriage, being in a state of weakness and illness, she made a further disclosure to her husband, not consistent with that which she had made before marriage, that she told him upon that second occasion that she had had before marriage connection with a man whom she knew and named, *Laidlaw*, a shepherd of her brother's; and that it was *Laidlaw* who was the father of the child in question.

Now, my Lords, I must pause here for the purpose of referring to the first of these statements, the statement after which the Appellant says he married this lady. It is a statement which I am bound to say appears to me, as it is given, to be one of the most improbable statements, one of the most difficult of belief that it is well easy to imagine. The statement is this, that a lady in a respectable position of life made this statement to the Appellant, also in a respectable position of life, before marriage, that she had been forced and ravished; and that he made no further inquiries about it than to ask her by whom, and she said she did not know—a low person, a blackguard; and that thereupon all inquiry on his part ceased, and that he, in a temper of romantic attachment, married the lady under those circumstances in order to shield her from the scandal which would arise from her pregnancy becoming known, and the birth of her child being made public.

It does appear to me that upon the mere statement of that story, without more, it is so contrary to the mode in which mankind generally act that, although it is impossible to say that it cannot be true, it is not too much to say that it is in the highest degree unlikely; and very strong corroboration would be required, or at all events it would be necessary to see that those upon whose testimony that story is to be accepted have always spoken with veracity and consistency, and in a manner which shews that their recollection and their accuracy of speech is entirely to be accepted.

I will ask your Lordships to try the evidence by those tests; but I am anxious, in the first place, to put aside what appears to me to be of comparatively minor importance in the case, but which yet seems to have occupied a good deal of the attention of the Court below. I mean the episode, if I may term it so, with regard to *Laidlaw*. He has been called as a witness in the case, and in form he denies that he had carnal intercourse with the lady; but his evidence is open to considerable observation, and it is said that it cannot be reconciled with the statements which he appears to have made in letters which are put into his hand and upon which he is cross-examined. My Lords, I should prefer, in the view I take of this case, to assume, although I only put it by way of assumption and not as stating that it is a conclusion I have arrived at, that there was evidence which might be held to establish intercourse with *Laidlaw* before the marriage, but I repeat that I do it merely by way of assumption for the purpose of what I have still to say. My opinion is that that is only a part of the case, and by no means the largest part. It may well have been that there was intercourse with *Laidlaw*, but the question remains, the great question in the case, Was there, or was there not, intercourse between the Appellant and the lady who afterwards became his wife; because if there was, there is then at once the means of accounting for the chain of circumstances to which I have already referred, and from which would flow the presumption of which I have spoken.

Now, my Lords, there was the possibility of intercourse—there was the opportunity for it—there was everything in the conduct of the parties which would lead you to suppose, unless the contrary is clearly made out, that there had been that intercourse, and the treatment of the child was on the footing of the child having been a child of the Appellant.

But is the testimony of the Appellant and of the lady to be accepted as negativing the fact of that intercourse? Now, my Lords, there, unfortunately, your Lordships have what I must term the opposite of clear, consistent, and unhesitating testimony. In the first place, I refer to the evidence of the lady. She stands convicted by her own confession of having made before marriage a statement which was not consistent with what she now says was the fact. She made to the Appellant the statement that she had been ravished against her will by a person unknown to her. The statement she now makes is that she had a connection which cannot be described by the name of ravishment with a person perfectly well known to her. But there is this further inconsistency in her testimony. In the condescendence which professes to give a narrative of this part of the case, and which must emanate from the statements and the instructions of the lady, there is a statement that she had connection with *Laidlaw* twice or oftener; and the actual places where the connection took place are mentioned. But in her testimony she recedes from that statement, and says that she had connection once, and only once, with *Laidlaw*, and denies any further connection.

With regard both to the lady and the Appellant himself there is this further observation in regard to their evidence. In the course of that period of three years to which I have referred, between 1872 and 1875, they had frequent meetings not merely with the girl but with a minister of the Free Kirk of *Scotland*, Mr. *Kay*, to whose congregation the young woman belonged, by whom she had been baptized, and who appears to have taken an interest in her welfare. The Lord Ordinary speaks of Mr. *Kay* as being a partisan of the Respondent. A partisan undoubtedly he was in this sense—that he appears to have believed that the Respondent was the daughter of the Appellant, that she ought to have been acknowledged as such, and that a wrong was being done to her by the refusal of such acknowledgment. But my Lords there is nothing whatever that I can observe, either in the course taken or in the expressions used by Mr. *Kay*, which for a moment would authorize your Lordships to hold that there was any reason why the evidence of Mr. *Kay* should not be accepted according to its literal effect, or which could impute to Mr. *Kay* any motives for departing from the strict line of truth in the evidence which he has given. My Lords, if the evidence of Mr. *Kay* is looked at, as I think it must be, as evidence entirely worthy of credit, from that evidence it is proved to demonstration that both as to the Appellant and as to the lady they, in the course of the communings between Mr. *Kay*, the Appellant, the lady, and the young woman, made at different times statements which are at variance with the evidence which they now give.

My Lords, the statements of the Appellant and his wife being as it seems to me in the highest degree improbable, they being statements as to which they have not been consistent at different times, and being statements especially which are highly inconsistent with expressions which have fallen from them during the period between 1872 and 1875, when the question of the paternity of this young woman was in the first instance raised, I come to the conclusion that I cannot, as against what is the presumption arising from the conduct in this case, accept mere declarations, even on oath, of the Appellant and his wife against the legitimacy of this young woman. These, my Lords, are the short grounds upon which I arrive at the conclusion which was unanimously arrived at by the decision now appealed from. I cannot find any fault with that determination; and therefore I submit to your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, in this very painful case I have come to the same conclusion as that which has just been expressed by the noble and learned Lord on the woolsack. The burden of proof of the proposition that this girl *Mary* is not the child of the Pursuer, who seeks to restrain her from claiming so to be, is thrown upon him; and the Judges of the Second Division of the Court of Session have come to the unanimous decision that he has not discharged that burden, and has not proved that this girl *Mary* is not his child. The Lord Ordinary came to a different conclusion. I must confess that I greatly regret that a case of this kind should not rather have been submitted to a jury than brought before the Judges sitting as judges both of fact and of law. However, that is the course of practice, and we have to deal with the case as we best may.

The remark caught my attention once or twice, I think, in the course of the Lord Advocate's able address, that we had not the advantage which he said the Lord Ordinary had of seeing the demeanour of the witnesses; but, my Lords, there is something in this case which, with regard to the more important witnesses certainly, diminishes the regret I might otherwise feel at not having been able to observe their demeanour when examined.

In course of the argument a great deal has been said upon presumptions of law and maxims of law. With regard to presump-

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tions as being applicable to this case, I think that the presumptions being, as is allowed by the Judges, and as was allowed by the counsel at the Bar, certainly not *de jure*, whatever may be said as to their being presumptions *juris*, it really comes only to this, that we are to look upon these so-called presumptions simply as deductions which sensible men make from the facts which are laid before them as evidence, open therefore to rebuttal by the same class of evidence, that is to say, oral testimony, as that by which the propositions they are supposed to point to are demonstrated and proved; in other words, by a contest of evidence, such as I consider there is in this case, and I approach the case with that view.

That being so, let us look at what the natural probabilities of the case are with regard to the facts disclosed. The facts disclosed, independently of the oral communications made from one person to another, are these: You have a gentleman who has for many years been paying courtship to a lady, now his wife, Mrs. *Gardner*. You have the fact that shortly before the period which seems to have been arranged between them for a marriage she is found to be pregnant, at a time when, of course, it was impossible that the pregnancy could have occurred in an honourable or reputable manner. She is, notwithstanding that, married; having gone before the marriage to consult some medical man, and it being declared by the medical man that she is undoubtedly near to her confinement; and after the marriage she is taken first to an out-of-the-way place at the seaside, and thence to *Edinburgh*, where, with a good deal of privacy which the landlord describes by the expression that the matter was shrouded in mystery, she is confined at an hotel. We find that the persons engaged with regard to that confinement, the medical man who was consulted before the marriage, and the person who attended her during the confinement, were all retained, if I may use the expression, and paid by Mr. *Gardner*, who had married the lady a few weeks before the confinement. We then find a fact upon which too much stress ought not to be laid, but a fact of some little consequence in the matter, namely, that the child when brought into the world, very scanty clothing having been provided for it, is wrapped up in a plaid which undoubtedly is known to have had the name of Mr. *Gardner* upon it; there was "*R. Gardner*" in the corner of the plaid. Being wrapped up in that plaid the child is carried off by Mrs. *Hutchinson*, and is never again seen during childhood by either Mr. *Gardner* or the undoubted mother, Mrs. *Gardner*. The child, however, was maintained to the age of fourteen, and by whom? By Mr. *Gardner*, who did not cease to maintain the child until the time had come when she was able to maintain herself; he does not seem to have thought it necessary to proceed after that with her maintenance, but up to that time the child was maintained by him. The child had not obtained so far as we can see in these proceedings any repute either by name or otherwise as being the child of Mr. *Gardner*. This part of the case is left in some uncertainty still. The child was baptized by the clergyman who has given his evidence in this matter when she was about sixteen years of age, soon after the time when she went to work at a mill in *Loanhead*, when she became a member of his congregation. She was baptized simply as "*Mary*." But from that time she seems to have commenced writing a series of letters to Mr. *Gardner*, in which she called him first "dear Mr. *Gardner*," and afterwards "dear father," and signed herself as "*Mary Gardner*," to which he responded, addressing his letters to her as "*Mary Gardner*."

Now, my Lords, putting all these circumstances together, there would have been very little doubt indeed as to the paternity of the child if matters had rested there. But then we are met with a very extraordinary story—that before the marriage Mrs. *Gardner* confessed to her intended husband that she was pregnant, and that the pregnancy occurred in this way: that she met, as she expresses it, a blackguard on a certain hill near the place where she resided, and that this blackguard forced her, and that the consequence of that was the state in which she found herself. He says that she was in such a state of agitation and distress at being obliged to make this communication, and that she was, as he believed, so attached to himself, as he explains it, that he was afraid that if the marriage were then broken off she would destroy herself, and he accordingly made up his mind to cover her discredit by marrying her at once; and then endeavoured, in order not to be fixed any more than could possibly be helped with the burden of a child who was not his own, to keep the story secret until the time came when by living as man and wife, and not having this child brought before their notice, and the time being come, as he afterwards expresses it, when she could maintain herself, this disgrace of the wife would, as he thought, be obliterated.

That in itself is an extremely singular story; and what marks the singularity of it more than anything else, I think, is, that he says that when he went to the medical man at *Edinburgh* and heard what he had to say upon the state of his wife, he gave him to understand that he was not the father, and after he had given him to understand that he was not the father, the medical man recommended him, by way of protecting his wife, if that were his wish, to hasten the marriage, to lose no time in getting the marriage performed, because she was very near her confinement. I confess that that is a view of the case which I have never been able to follow as consistent with the ordinary rules of probability; but it seems to have received the sanction of some of the learned Judges in the Court below, though not of all, and certainly not of the Lord Justice Clerk, who appears to have taken the same view as I have taken of that part of the case, namely, that it requires a very considerable stretch of charitable allowance to suppose that this was a really true and correct narrative, namely, that being told that the lady is to have a child which is not your own, the medical man whom you consult tells you the best course you can take is to marry that woman as soon as possible.

My Lords, the *onus* of proof was upon the Appellant, and that *onus* he certainly has not discharged.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I think the question is not so much one of law as one of evidence, and the conclusions to be drawn from the evidence as to one point which I will state directly.

The question is whether or no Mr. *Gardner*, who is the Pursuer, has sufficiently established that *Mary Gardner*, undoubtedly and admittedly the daughter of his wife, undoubtedly and admittedly born after wedlock, is not his child. That is the issue which he has taken upon himself to establish. The Lord Ordinary thought that he had established it. The Judges of the Second Division unanimously thought that he had not established it; and the question now upon appeal is, whether it has been established or not?

Now, my Lords, I take it that we cannot express what I think is really the leading point here in better words than those which were used by Lord *Gifford*, namely,

> Wherever an avowed and open courtship has taken place, and there have been opportunities of access, and thereafter the man marries the woman in an advanced state of pregnancy, knowing that she is so, and hurrying on the marriage, as happened here, for that very reason, I do not say that the presumption of paternity is absolutely conclusive, but I do say it is almost as strong as such a presumption can be (1).

Mr. *Gardner* and the lady afterwards his wife were in the habit of seeing each other during a long courtship; and it is idle to suppose that a woman working on a farm in *Scotland*, and a man, a farmer in the neighbourhood, had not ample opportunity of intercourse together. Then she, thinking she was with child, consults him. That is admitted. He causes her to go and see Dr. *Thatcher*, and upon Dr. *Thatcher's* advice that she is with child and that they had better hurry on the marriage, they do hurry it on and are married.

My Lords, if the case stood there, I think nobody could have doubted that the *primâ facie* presumption of the Appellant's paternity was fully established. I do not think that that presumption is met merely by proving that some one else had intercourse with the woman. That is a very important step, but I am far from thinking that that is sufficient by itself. I think in order to rebut such a case as this it is necessary to establish to the satisfaction of the tribunal which has to try the question that the husband, the man who has made this very strong case against himself towards admitting that he was the father of the child, had not had intercourse with the mother at such a time that he could be the parent of the child. I do not think that the presumption of parentage is nearly so strong in such a case as it would be or ought to be if the time when the child was begotten was after the parties were married and were husband and wife. But when it is proved (supposing that to be the case) that the man who afterwards became the husband had connection with the woman who afterwards became his wife, so that he might be the parent of her child, I do not think you can in that case, any more than in the case of a child both begotten and born during matrimony, enter into an inquiry, which would be a very indelicate one, and one in which it would be almost impossible to prove the fact, as to who was the father of the child. Nevertheless, if you shew that another man had connection with the woman at that time, you take a considerable step, you remove one of the things which would have been a great difficulty in your way in shewing that the man who afterwards became the husband was not the father. As to the husband's not having had connection before marriage, what would be sufficient proof of that must, I apprehend, not depend upon any technical precise rule, but must depend upon whether it is made out upon the facts existing in the particular case.

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(1) 4th Series, vol. iii. p. 721.

Now here we have the distinct oaths of both the husband and the wife on a matter on which certainly I think they cannot be mistaken. They both positively swear that before they were married there never was intercourse between them at all. It is a very painful thing, my Lords, where there are distinct and positive oaths of that sort for any Judge or tribunal to say,—I cannot believe those direct oaths: nevertheless it must sometimes be done. There are frequently things sworn to which are so improbable that one does not believe them. It is one of the commonest things in the world in a criminal case to have the most positive oral evidence given on oath to establish a matter which neither the jury nor the Judge can believe, although it is sworn to. In this case I cannot act upon this evidence. I do not know that it is necessary to say that I disbelieve the Appellant and Mrs. *Gardner* to such an extent that I should find them guilty of perjury if I were upon a jury trying them on such a charge; but I disbelieve them to this extent—I cannot believe their testimony so as to act upon it in this case, and I will proceed to state why.

There is an extremely strong presumption through the whole history of the case that Mr. *Gardner* when he married a woman whom he knew to be with child, believed that he was the father of the child—that he knew that circumstances had occurred which might have made him the father of the child, and therefore believed it. That strong presumption arising from his conduct has to be explained away. The story which Mr. and Mrs. *Gardner* tell to explain it away is, that she whom he had been courting, and whom, according to his account of the matter, he had never ventured to take the least liberty with, came to him and told him she feared she was with child, and that some months before she had been assaulted by a blackguard upon the hill; that she had never mentioned it to anybody (that is what the statement amounts to in effect) up to this time, when she came to him and told him this story. It is a most startling thing for one's notions of human conduct that a betrothed bride should go and say this to her betrothed husband,—that she should state this to him who was about to be her bridegroom of all persons. She had female relatives and others to whom she could have told it. But if she did state it, it is a startling story, which must have made an impression upon his mind—one would think he never could have forgotten what passed at that interview. He says, upon hearing it, he had the very romantic generosity that, in order to save her character entirely, he married her, believing her to be with child by this ruffian who had ravished her.

My Lords, what I proceed upon is this: I think here there was a strong *primâ facie* presumption of fact made out that this child was the child of the Appellant, and I do not think that that is rebutted.

LORD GORDON:—

My Lords, there is no dispute as to the law applicable to this case, I think, in the Court below, or among any of your Lordships. Lord *Gifford*, whose judgment has been referred to, says that

> The presumption arising from conception, or possible conception, during marriage is a mere presumption, which may be rebutted and overcome by clear and satisfactory contrary evidence. The law of *Scotland* has never made or treated this strong presumption as a *presumptio juris et de jure*. It must yield to evidence, and I think the law of *Scotland* has always been that the presumption may be overcome, not only by evidence that it was physically impossible that the husband of the mother could be the father of the child, but by every species

of moral evidence sufficient to satisfy a reasonable mind that the child was begotten by some one else than the husband (1).

The question, therefore, comes very much in the shape of an issue to try whether *Mary Gardner* was the daughter of the Appellant; and, while one may almost regret that the question has not been submitted to a jury, who might have seen the witnesses who gave them evidence, it is right that your Lordships should understand that the reason which I presume influenced the Court was, that according to the old law these matters were treated before the Judges acting as a Consistorial Court, and that there was a mere right of appeal to the Court of Session. I have not looked into the Act of 1868 since the present question arose, but it does occur to me that under the Act of 1868 it might have been possible to have brought this question before a jury. At the same time the Court would be influenced to a great extent by the consideration that it is not desirable that questions of this character should come before a jury, and thereby become the subject of publication and general discussion; therefore they have reserved such questions rather more for the consideration of the Court, as it has been done in this case.

Now the question is this, whether there has been proof that satisfies the Court that *Mary Gardner* is not the daughter of the Appellant. Upon that point there is no doubt that there is a strong presumption in favour of the paternity, where the child is born after marriage between the parties. In this case there is no doubt whatever that *Mary Gardner* is the daughter of Mrs. *Gardner;* that is admitted. The way in which it is attempted to be made out that she is not the daughter of Mr. *Gardner* is that an account is given of an occurrence that took place at *Cademuir Hill* in 1849 or 1850, and it is said that Mrs. *Gardner* was made the subject of a violent rape or attack upon her, and that this child was the result of that. My noble and learned friend the Lord Chancellor has stated, I think, with very great clearness, that in such a case as this it is absolutely necessary that the statement which is placed before the Court, and attempted to be supported by evidence, should be of a very clear, distinct, and consistent

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(1) Fourth Series, vol. iii. p. 721.

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character. Now, tested by that consideration, I cannot say that the statements which were made in the first instance by Mrs. *Gardner* to Mr. *Gardner*, or even those placed on the record, are of that character. I think that it is not possible to read Mrs. *Gardner's* evidence or Mr. *Gardner's* evidence so as to shew that there was a satisfactory account given to him of the occurrence to which I have referred. Then we come to this, that the case is attempted to be made out by statements and by evidence which are not consistent, and which are contradictory to one another, and that really it is not a reasonable statement or attempt to prove the case of the Pursuer; and upon that ground I venture to think that your Lordships are quite right in coming to the conclusion which you have arrived at.

I am sensible that very great care has been bestowed, not only by the Court below, but by your Lordships, in the consideration of this very extraordinary case, because it is extraordinary in this respect, that the husband and the wife concur in the statements which tend to repudiate responsibility for this child. I venture to differ from my noble and learned friend who spoke last (Lord *Blackburn*) with reference to the perhaps rather strong terms in which he appeared to express himself as regards the import and effect of the evidence of these witnesses. As to Mr. *Gardner*, I have an impression that he did conscientiously believe that Mrs. *Gardner* had upon the whole made a disclosure to him of the position in which she was placed, although, looking back upon it afterwards, it does appear incredible to us. But I would rather place the case upon this, as the Court below have done, that this is a case in which the Pursuer has failed to prove that he is not the father of *Mary Gardner*. The Judges below express hesitation—Lord *Gifford* in particular, whose judgment has been quoted with such approval, both with reference to the statements in point of law, and also with reference to the evidence in the case, says that he looks upon it as a case of very great difficulty, and that he has arrived at the result after very great hesitation. His Lordship says:

> It is only with great hesitation, and after very anxious consideration, that I have come to concur in the opinion now expressed by all your Lordships.

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But I think that having regard to the very serious consideration it has received in the Court below and before your Lordships, especially after the able pleadings which we have heard from both sides, your Lordships can have no hesitation whatever in approving of the judgment which has been proposed by my noble and learned friend the Lord Chancellor.

Interlocutor complained of affirmed, and appeal dismissed with costs.

Agents for the Appellants: *Grahames & Wardlaw.*
Agents for the Respondents: *Ashurst, Morris, Crisp, & Co.*

[HOUSE OF LORDS.]

THE RIVER WEAR COMMISSIONERS . APPELLANTS;

AND

WILLIAM ADAMSON AND OTHERS . . . RESPONDENTS.

H. L. (E.)
1877
April 30;
May 8;
July 27.

3 App Ca
408

5 App Ca
890

7 App Ca
158

New Statutory Liability—Piers and Harbours—Shipping—Act of God.

A statute which refers to the matter of a Common Law liability and declares to whom it shall attach, will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose.

The 10 Vict. c. 27 (*The Harbours, Docks, and Piers Act*, 1847) enacted that "the owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damage done by the same." There was a proviso exempting the owner from liability in cases where the vessel was in charge of a licensed pilot whom the owner was "bound by law to employ and put his vessel in charge of":—

Held (affirming the judgment of the Court of Appeal), that, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable.

Per THE LORD CHANCELLOR (Lord *Cairns*): The clause is a clause of procedure only, dealing with the mode in which a right of action already existing shall be asserted, but not creating a new and extended liability.

LORD GORDON, *diss.*, on the ground that the intention of the Legislature in passing the Act must be decided by the ordinary meaning of the words used, and here the words used in the first portion of the section were words creating a liability without any restriction whatever.

THIS was an appeal against a decision of the Court of Appeal, by which a judgment of the Queen's Bench Division had been reversed (1).

The Respondents were the owners of a steam vessel called the *Natalian*, which, on the 17th of December, 1872, was proceeding on a voyage from the *Thames* to the *Tyne*, when it encountered a violent storm near the mouth of the *Wear*, and went ashore at the entrance of the *Sunderland Docks*, the persons on board being saved by the rocket apparatus. The men had not been able, before they escaped from the wreck, to take down the sails, which were therefore left fully unfurled at the moment that the vessel went on shore. The tide was then low. The storm continued, and, when the tide rose, the sails acted on the vessel, which partly floated, canted round, and struck against and injured the pier. The Commissioners under the *Harbours, Docks, and Piers Act* of 1847 (10 Vict. c. 27) (1) sought to recover damages for this injury. The declaration set forth the statute, and alleged negligence on the part of the master and crew; and the Defendants, among other pleas, set up an allegation of negligence on the part of the Commissioners and their servants, but these allegations of negligence were, by mutual consent, withdrawn, and the case went to the jury on the plea of the general issue alone.

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(1) 1 Q. B. D. 546.

The cause was tried before Mr. Justice *Quain* at the *Durham* Summer Assizes of 1873, when a verdict was entered for the Plaintiffs (the Commissioners); the amount of damages was referred to an arbitrator, and leave was reserved to the Defendants to move to enter a nonsuit, or a verdict for the Defendants. A motion was subsequently made for this purpose, when, on the authority of the case of *Dennis* v. *Tovell* (2), the rule was refused. On appeal this decision was reversed, and the verdict was ordered to be entered for the Defendants. This appeal was then brought.

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(1) By the 10th Vict. c. 27, s. 74, it was enacted that "The owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith; and the master, or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same, and the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damages done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ, and put his vessel in charge of."

(2) Law Rep. 8 Q. B. 10.

Mr. *C. Russell*, Q.C., and Mr. *Shield* (Mr. *Herschell*, Q.C., was with them), for the Appellants :—

The object of the Legislature was to protect the persons who undertook the construction of piers and docks, so necessary for the benefit of the commerce of the country. The protection was meant to be unrestricted, for if not, there was no necessity for the enactment, the absence of which would have left the constructors of the pier to the protection afforded by the Common Law. The words of the 74th section were meant to give the undertakers a protection beyond that afforded by the Common Law, and shew in the clearest manner that such protection was intended to be without restriction. The first clause of the section makes the owner of every vessel or float of timber answerable. The enactment is direct, the words plain and positive, and the enactment does not contain any limitation on his liability by any reference to the master being on board or having the management of the vessel or the float, or to his conduct or his capability or skill. The second sentence of the section makes the master or person having the charge of such vessel or float of timber "also" liable, but in his case it does introduce wilfulness or negligence into consideration. The object of the Legislature is plain. The owner is to be liable at all events, and the person having the charge is to be liable in the case of wilful or negligent conduct, but only then. The compulsory presence of a pilot may, under the last clause of the section, relieve the owner; but the fact that that particular matter is thus specially provided for, shews that the general liability of the owner was intended to be most extensive. And it is very reasonable that it should be so, for there may be many cases in which serious injury may be done to piers and docks where, if the constructors of them were left to their ordinary Common Law remedy for injury caused by acts, whether wilful or negligent, they might be unable to give actual proof of either, and would be left without any protection whatever. [LORD O'HAGAN :—Does not the first clause of the section shew that it was to be applicable only in the case of the vessel or the timber being under the management of somebody ?] There is no mention of that. But even assuming that to be so, it does not follow that the actual active management or control of any particular person was intended. A ship may be under the management of somebody without his actually being on board at the moment; but that circumstance is not to deprive the pier constructors of the protection intended to be given them by the Act. The case of *Eglington* v. *Norman* (1), decided only the other day, shews that to be so.

The meaning of this section of the statute was fully considered in *Dennis* v. *Tovell* (2), and the Court there had no doubt about it. [The Lord Chancellor:—The facts there were not the same.] It is true that there the master and crew were on board at the time, but it was distinctly found that the mischief was not occasioned by their fault but was "inevitable." The general words of the section as to the liability of the owner were therefore applied to the case. The principle stated in *Rylands* v. *Fletcher* (3) was clearly an authority for establishing the liability of the shipowner, for he brought on to the pier something which would be mischievous if not kept under proper control; he did not keep it under proper control, and the fact that he acted without personal wilfulness or negligence did not exempt him from liability.

It has been contended here that the damage was attributable to the act of God, and that therefore no liability was incurred. But that argument cannot be supported, as against the clear and positive provisions of a statute. Even in the case of a contract, where a contract is made between two individuals, the non-performance of it is not excused by the happening of something which is beyond the control of the person in default. And that must be so still more strongly where a statute (especially for a good public purpose) imposes a liability without any limitation as to incurring it. In *Reg.* v. *Leigh* (4) it was held that a landowner may be liable by prescription to repair sea-walls though destroyed by extremely tempestuous weather. In *Nichols* v. *Marsland* (5), it was, no doubt, held, that one who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for its escape if caused by the act of God or by *vis major*. But that is a case where the obligation was created by a mere implication of law, and cannot therefore be compared to a statute, where the obligation is, by clear and unequivocal terms, imposed by the Legislature; and here the words of the statute are the stronger, because they are expressly applicable to the facts of the case. In *The Merle* (1) it was held, in circumstances like those which exist in the present case, that the shipowner was, under the 74th section of the Act, prevented from setting up the defence of unavoidable accident. The authorities upon this point are collected in *Broom's* Legal Maxims (2). The Legislature plainly intended to extend the Common Law liability and the Common Law remedy for mischief done, but that intention would be defeated if no liability should be held to exist here. There was not here any evidence of such an overwhelming power of storm as to excuse the Defendants from not doing something else, but even if there had been, that would not take them out of the operation of the plain and express words of the statute.

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(1) 46 L. J. (Ex.) 557.

(2) Law Rep. 8 Q. B. 10.

(3) Law Rep. 3 H. L. 330.

(4) 10 A. & E. 398.

(5) 2 Exc. Div. 1.

Sir *J. Holker, A.G.*, and Mr. *Greenhow*, for the Respondents:—

There may be nothing unreasonable in holding the owner of a ship liable for ordinary damage caused in an ordinary way, but the Legislature never could have intended to make him liable for damage occurring when the ship was really no better than a helpless log upon the water, when the master and crew were with difficulty saved from death, and the owner had not any means whatever of exercising any possible control over the vessel. The terms of the section shewed that the liability was only to be incurred when some degree of control existed. The object of the section was to secure the liability of the owner in circumstances where, without the statute, it might have been impossible to fix him with liability under the Common Law. It was, in fact, a regulation of procedure not the creation of a new liability. He was to be answerable, that is liable to be called on to answer, even though the mischief might not be something that quite amounted to gross negligence or to wilfulness, and though he was not there he was still to be liable in the first instance, for the wilful or careless act of the master, for which he might not be liable at Common Law. The real object was, when there was, in fact, a proper title to indemnify, that the pier owner should have somebody that he could at once resort to, without being embarrassed by legal technicalities and difficulties. But there was no proper cause for compensation here. The damage was occasioned by the storm, by the action of the winds and waves, after the men had been with difficulty saved from the wreck, and when no human power had any control over the vessel. Some of the cases cited on the other side had no application to the present. There was no doubt about liability under a covenant to pay rent though the premises had been destroyed by fire; that had been settled so long ago as *Paradine* v. *Jane* (1); *Brewster* v. *Kitchell* (2); that was the result of a stipulated agreement; but that principle could not be applied to a case where no agreement of any sort had been made, and the liability was entirely the creation of a particular phrase in an enactment which was really a legislative provision of a peculiar and almost private kind.

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(1) 2 Marit. Cas. 402.

(2) Page 211 *et seq.*, 3rd Ed.

The case of *The King* v. *The Commissioners of Sewers for Somerset* (3) shewed that though the owners of lands adjoining the sea were bound to repair a sea-wall, if that wall was destroyed by a tempest, without any fault on their part, it must be repaired at the expense of the level and not of them alone. In *Nugent* v. *Smith* (4) a common carrier received a mare on board his vessel to be carried to *Aberdeen*. The weather was very tempestuous—the mare struggled violently, and in the end died. The Defendant, though a common carrier, for such was his particular business, a shipowner not necessarily being a common carrier, was held not to have been an insurer against such a misfortune, which had happened through means over which he had no control, and it was distinctly stated that in such a case it was sufficient to prove that by no reasonable precaution could the mischief have been prevented. Here the case was still stronger, and the principle of exemption from liability was therefore still more clear.

Mr. *Shield* replied.

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(1) Alleyn, 26.

(2) 1 Salk. 198.

(3) 8 T. R. 312.

(4) 1 C. P. Div. 423.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, on the 17th of December, 1872, the steamship *Natalian* was attempting, under stress of weather, to enter the *Sunderland Docks*, belonging to the Appellants; while it was still in the open sea, about forty or fifty yards from the pier, it struck the ground, canted with its head to the south, and drifted, bodily, ashore. The crew had been rescued from the ship by means of the rocket apparatus. The tide was low at the time; and as the tide rose, the flood and the storm drifted the ship against the pier and caused damage to the amount of £2825 13*s*. The Respondents are the owners of the ship, and the question is, whether they are liable to pay this damage to the Appellants.

The Court of Queen's Bench held that the owners were liable. The Court of Appeal has been unanimously of opinion that they are not. The question depends upon the true meaning of the *Harbours, Docks, and Piers Clauses Act,* which enacts that the owner of every vessel, or float of timber, shall be answerable to the undertakers (that is in this case to the Appellants), for any damage done by such vessel, or float of timber, or by any person employed about the same, to the harbour, dock, or pier, with certain farther provisions, which I need not at present mention.

The Court of Appeal has been of opinion, and I think rightly, that the injury was not in this case occasioned by the voluntary act or by the negligence of the Respondents, or, indeed, of any person on board of, or connected with, the ship; that it could not have been prevented by any human instrumentality; but that it was occasioned by a *vis major,* namely, by the act of God in the violence of the tempest. Founding himself on this, the Master of the Rolls states that it is a familiar maxim of law that where there is a duty imposed or liability incurred, as a general rule there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies, and his opinion is that the Court may well come to the conclusion that the act of God and the Queen's enemies were not meant to be comprised within the first words of the section. The Lord Chief Baron states that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God.

Lord Justice *Mellish* states that the act of God does not impose any liability on anybody. Mr. Justice *Denman* states that in every Act of Parliament words are not to be construed to impose a liability for an act done, if the act is substantially caused by a superior power such as the law calls the act of God.

In my opinion, these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by Common Law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages. If, therefore, by the section to which I have referred, it is meant that the owner of every vessel shall, independently of whether anything has happened which would, at Common Law, give a right of action against any one, pay to the undertakers the damage done by a ship to the pier, I should be unable to see any reason why the payment should not be made in the manner required by the statute.

I cannot, however, look upon this section of the statute as intended to create a right to recover damages in cases where, before the Act, there was not a right to recover damages from some one. The section and those which follow it are in an Act which collects together the common and ordinary clauses that it was the habit of Parliament to insert in the private Bills authorizing the construction of piers and docks. There was no special legislation intended on this head for any particular place or any particular state of circumstances; and it would be difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts, the Legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by Common Law, could intend to create a new right and a new liability to damages unknown to the Common Law.

By the Common Law, if a pier were injured by a ship sailing against it, the owner might be liable if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without shewing that those navigating the vessel were his servants.

In my opinion, it was to meet this state of the law that this section was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at Common Law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. The section relieves the undertakers from the investigation, always a difficult one for them to pursue, whether the fault has been the fault of the owner, or of the charterer, or of the persons in charge. It takes the owner as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable; that is to say, the person who is to answer, or is to be sued for the damage done. It does not absolve the master or crew, if there has been wilful fault or negligence on their part. They, in that case, may be sued as well as the owner, but if the owner is thus in the first instance made to pay the damage where there has been wilful or negligent conduct on the part of the master or crew, the owner may, under the subsequent sections of the Act, recover over against the master or crew; and if the damage has occurred by reason of the act or omission of any other person, if, for example, some one who had hired the ship, sent her to sea insufficiently manned, and the accident occurred in consequence, the owner might apparently under those sections recover from the hirer by reason of this act or omission.

The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against any one existed before.

This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but every thing is left as it would be at Common Law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at Common Law, and the Act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest, the owner would not be liable.

I therefore think, although I do not concur in the reasoning of the learned Judges of the Court of Appeal, that their conclusion was right; and that the appeal ought to be dismissed with costs.

Lord Hatherley:—

My Lords, I must candidly say that this case has given me much anxiety, and I have felt very great doubt and difficulty as to the proper interpretation to be given to this clause, which is, as it appears to me, somewhat inartificially framed. I cannot concur in the views expressed in the Court below by some of the learned Judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in Law Courts, the act of God, namely, a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief. Neither can I think, on the other hand that, as has been held by others of the learned Judges in the Court below, the clause in question refers only to cases where a vessel is in charge of somebody. I do not think, in the first place, that the grammatical construction of the clause will admit of that solution of our difficulties.

The words are these, "The owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber," there is no reference there

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to anything but the simple fact of the existence of a vessel, or float of timber, which has created damage, nothing is said about its being in charge of any one or not; but then the clause proceeds, with a disjunctive, to say "or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel" (now for the first time you arrive at that personage) "or float of timber through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. And the undertakers may detain any such vessel, or float of timber, until sufficient security has been given for the amount of damage done by the same," and then comes a special exception in a case where a pilot is compulsorily employed.

When we look at the whole construction of the clause, it appears to me that it speaks in the first place of damage done by a vessel without regard to any one being on board or not; then it speaks in the second place of damage done by any person employed about the vessel; and then it says that the master or person in charge of a vessel is to be liable if damage is done through his wilful act or negligence; and then the excepted case occurs of the pilot, because he had been compulsorily, and against any power of resistance on the part of the owner, placed on board and in charge.

Now, my Lords, we have to see whether or not damage arising from the act of God, that is to say in the particular case a tempest, should be held to be excepted. There might be other cases which would be similar to this of a tempest; the vessel might have been driven on the pier in some other way, or have been injured and become unmanageable by lightning or the like. However it occurred, if the pier was damaged by the vessel in the way which was called by the learned Judge in the Court below the act of God, is there anything in the Act of Parliament to say (and this clause seems to contain all that is said in the Act about it) that the owner of the vessel shall not be responsible for the damage, but that there shall be an exception in respect of damage so caused?

One can easily conceive that the Legislature might think it desirable that those who provide this great accommodation for the navigation of the country, those who provide harbours of refuge and the like, which are greatly wanted in many parts of the coasts of the *United Kingdom*, should be indemnified against the possible damage which may accrue to their docks, or to other works which they construct in discharge of the duties in question, and in the exercise of those powers which they have for making docks and other works. Those promoters might say, We offer protection to the public at all times, only, in consideration of the benevolent hospitality which we so afford, protect us from having our works damaged. There is nothing, as it appears to me, utterly unreasonable in such a proposition reasonably carried out. It is quite true that many cases put by the learned Judges in the Court below, are cases in which it would seem to be a very rigid enactment indeed that damage to a very large and extensive amount, exceeding the value of the vessel itself, should be compensated by the persons whose vessel has done this damage, being made answerable to make it good to the full amount of the damage done, which might even go to the destruction of the principal works, and might therefore result in the ruin of those persons whose vessel had been so forced against them. But, on the other hand, if there was any intention at all of giving a relief of this kind, which must be sought of course in the words of the Act, then I apprehend that the exception of a storm or tempest would be a very singular one, because it is a probable case to happen. There are, no doubt, many other ways in which damage might be done, but it is amongst the very probable causes that a storm or tempest should be the thing which would occasion the damage through the medium of the ship which directly produced that damage. I do not think, therefore, that I can say at all satisfactorily to my own mind, that, provided that the Act itself is clear and specific in its clauses, the party who caused the damage could be exempted because the damage was the result of a tempest and not of what is ordinarily called his fault. Neither, as I have already said, by the grammatical construction of the clause, do I think that the clause is only to be applied in cases where some master or other person is in charge of the vessel.

Possibly the expression of the late Lord Justice *Mellish* may come nearer to the mind of the Legislature, and any view of his

I look to with the deepest and most unfeigned respect. His notion of the general intent of the clause is this: that it points to something in which man is concerned—I think that is his expression—that is to say, in which human agency intervenes, and it was on that ground that he coincided with the views taken by the other learned Judges. His idea of the whole intent and purport of the clause was, not that the act of God was wholly to excuse the person liable under the enactment, if that liability once existed, but that the clause pointed to some act of man which was to take place, and not to a mere casualty occasioned by the tossing and driving about of the vessel from the effect of a storm upon the sea.

My Lords, finding that I cannot concur in the reasons given in the Court below, of course I have to consider the construction of the clause. I think that taking the view which was taken by the Appellants in this case, the clause has been framed with probably extraordinary pressure and severity against the persons by whose vessels this damage would be created. No one can possibly deny that; and that severity seems to have induced some of the learned Judges before whom the case has come, to think that it is impossible to attribute such an intention to the Legislature. Now I am afraid that it does sometimes occur, that an Act of the Legislature cannot be carried out without very great inconvenience and hardship, but that is not because the Legislature intended it, but because the possibility of its occurrence has been forgotten. I think that such a circumstance may have occurred here, and produced the enactment that we have before us.

However, it is the opinion, I believe, of the majority of your Lordships that, on the whole case being considered, this is not a case that we can regard as struck at by this clause. Whether the ground to be assigned for that is the view which has been expressed by the noble and learned Lord who preceded me, and of whose opinion I speak with the highest respect, or whether any view may be adopted by any of your Lordships similar to that taken in the Court below, leading to the conclusion that the damage which here occurred is not brought within the meaning or purview of this Act, I shall not pause to inquire. There being this doubtfulness of opinion, I shall not do what I might probably under other circumstances have thought it my duty to do in this case. I am unwilling to do anything farther than to say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack otherwise than with extreme doubt and hesitation.

Lord O'Hagan :—

My Lords, I need scarcely say that this is a difficult and embarrassing case. The various views which have been adopted by able Judges make this fact plain, and I hardly think that any conclusion to which we can arrive will be completely satisfactory.

The difficulty arises from the form of the short clause we are required to interpret. Your Lordships, exercising your appellate jurisdiction, act as a Court of construction. You do not legislate, but ascertain the purpose of the Legislature; and if you can discover what that purpose was, you are bound to enforce it, although you may not approve the motives from which it springs, or the objects which it aims to accomplish.

Our daily experience demonstrates that the task of construction, so understood, is not an easy one. It sometimes involves the necessity of harmonising apparently inconsistent clauses, and making homogeneous provisions cast together, hap-hazard, by various minds, differently constituted and looking to different and special objects, without due regard to the harmony of the whole. I have often thought that our legislative arrangements need much revision in this regard, and that, if it were possible, a department should be instituted by which bills, after they pass committee, might be supervised and put into intelligible and working order, and then submitted for final revision to Parliament before they pass into laws. But in the meantime we must deal with things as we find them, and reach, if we can, the true meaning of the confused words with which we often have to deal.

Undoubtedly, if the first division of the 74th section of the *Harbours, Docks, and Piers Clauses Act*, 1847, stood alone, it would seem to cast upon the owner, under all possible circumstances, liability to the undertakers for any damage done by his vessel. That was the view reluctantly adopted by the Court of Queen's Bench, which we are asked to affirm in opposition to the

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judgment of the Court of Appeal. And if your Lordships, on a full consideration of the whole clause, are satisfied that it was the view intended to be carried out, you have no alternative but to act upon it. No speculation as to the inconvenience, or even the injustice, which it may accomplish, no consideration of the admitted innocence of the owner of the vessel, or of the inevitable nature of the accident which wrought the injury, would justify a refusal to interpret the statute according to the design of the makers of it. And if you clearly see that they meant the liability to be unqualified and universal, you are not at liberty on such grounds to defeat that design, and say that the Appellants shall not have the benefit of it. If the law, as it stands, is oppressive or inequitable, the Legislature, which devised it, can alone reform it; and certainly, in my judgment, should your Lordships feel yourselves obliged to reverse the ruling of the Court of Appeal, such a reform will be needful and should be promptly made.

For, my Lords, the results of such a reversal seem very serious. It would involve the obligation of an owner to make good damage done by his ship, although, as in this case, he might be free from blame for any imaginable wrong by himself or his servants, or in any other way. If, necessarily abandoned on the high seas a thousand miles away, the ship drifts ashore after long wandering, and does an injury, or if, taken out of his hands absolutely by a pirate or an enemy, it is brought in his absence, and against his will to attack the coast of *England*; or if, as was put by the Judges of the Appeal Court, the undertakers themselves should have got hold of the owner's vessel and employed it so as to injure their own pier,—in all these cases and in others easily to be conceived, he would be responsible for results to which he had not contributed.

Now, no doubt, it is possible that the Legislature may have contemplated, for the protection of harbours, docks, and piers, an enactment fraught with consequences of this description; but, before we attribute to it so strange a purpose, we are bound, I think, to see whether the phraseology it has used, taken altogether, does not enable us to reconcile its action with common sense and common justice, and to say that, although it has spoken

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obscurely, it has not made unavoidable such a very startling construction of its words.

The case before us is not, perhaps, quite so shocking as those which have been just supposed as tests of the effects of this piece of legislation. But, certainly, it does seem hard that the Respondent, having had his ship so injured by the winds and waves on the high seas that its crew, to save their lives, abandoned it, and it was derelict, and was forced by the storm against the pier, should not only have lost its value, £10,000,—save in so far as it was insured,—but, in addition, nearly £3000 for mischief done admittedly without fault of his and by the act of God. We must take care that a hard case shall not make a bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity.

Now, I have come to the conclusion, although not without serious hesitation and misgiving, that there is no such necessity, and that, well considered, the statute is not applicable in the peculiar circumstances before us.

I do not propose that your Lordships should act on any large application of the old maxim, "*Qui hæret in literâ, hæret in cortice,*" or refuse, from any assumption of error in policy on the part of the Legislature, to give effect to the literal meaning of the Act. But, when we pass from the first clause of the section, and find it dealing with "the master or person having the *charge* of *such* vessel," I think it is indicated that "*such* vessel" may be taken to limit the description of "*every* vesssel" in the preceding phrase, and to confine the liability of the owner to vessels "in charge" of a master or somebody else. I do not see how we are to give effect to the word "such" otherwise than by qualifying the generality of the preceding language, and holding, with Lord Justice *Mellish,* "that the section points to something done by the act of man, or to the act of the person in charge."

The terms of the statute appear to me fairly to bear this interpretation; and, if they do, it is manifestly more in accordance with reason and probability than that which is opposed to it. In any view, the provision is hard upon the owner, and puts him in a worse position than he would have held at Common Law. But,

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there is something comparatively tolerable in the notion that he shall be responsible, if accident occurs when his captain, or some one else employed by him, acting for him, and under his control, has, at least, the chance of avoiding it. When this chance is gone, because his servants cease to be in charge, and his ship becomes an ungoverned log, irresistibly borne against a pier, without the possibility of check or guidance, the hard measure of liability for an act which is not his or his agent's, should not be imputed to him, if there is fair ground for thinking that the section did not contemplate such a state of circumstances. In the one case, it may be just that the owner should answer, if the injury arises from the actual or presumed default of his servants, and it may be politic to make him careful in the selection of them, from an apprehension of the consequences of such an actual or presumed default. On the other, his utter and necessary powerlessness to avert the mischief should make us slow to say that he was meant to answer for it.

Then, as to the proviso, it appears to be reasonably explicable on the one construction, and not on the other. If it was meant that the owner should be universally liable, whether or no any control remained with him or with his crew, how can we account for the exception as to the presence of the pilot? The injury is the same, the instrument of the injury is the same; and why, if the liability is to arise, without any regard to circumstances, in all other cases, although every possibility of control or default is absent, why should the pilot's compulsory employment exonerate the owner? On the other hand, if the true construction makes him only liable when a master or some other freely chosen by himself, and on his own responsibility, is in charge, we can see good reason for the exoneration as soon as the pilot, whose retainer is not optional, as in the case of his own people, assumes the care of the ship, and so disables him from meddling with it, directly or indirectly. In the one case there is some control remaining with him, in the other there is none. The law displaces the person he had chosen to guide his vessel, and he is made irresponsible. Why should he not be so, when the stress of the storm has the same effect, and forces his captain and his crew to abandon the trust he had committed to them? The proviso appears to me persuasively to sustain the argument of the Respondents.

It has been said that unless the Appellants prevail the statute must have failed of its object—which was manifestly the greater protection of the pier owners—because it gives them nothing which they had not at Common Law. I think that this is a fallacy. At Common Law, there were serious questions continually arising, which, on either construction of the statute, can arise no more. Often it was doubtful on whom liability should be charged, or by what evidence the charge of it could successfully be sustained. We can well conceive that the undertakers might have found difficulty in properly selecting a Defendant, amidst the varying circumstances which affect the direction and management of merchant vessels, and the proof, establishing responsibility, must often have been hard to find, and inadequate to satisfy a jury.

I do not know the exact history of the legislation, but, in this state of things, the undertakers may, perhaps, have reasonably complained that, having performed great public service in forming a harbour, a dock, or a pier, they found themselves unable to recover for injuries confessedly done to works accomplished with much expense and labour, and of the utmost importance to the commerce of the country. And the Legislature may have fairly said, that greater protection was due to them than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly, the Legislature made the owner—a person easily and always to be found—"answerable," *as* owner, and dispensed with the proof of negligence or any other proof, save of the fact of injury by the vessel—in all the cases contemplated by the Act. This was a great change, and a great addition to any security which the undertakers enjoyed at Common Law; and it was so, whether we give the clause the universal force for which the Appellants contend, or the more restricted application, which, with the Court of Appeal, I think your Lordships ought to attribute to it. And, in addition, a farther material advantage, unknown to the antecedent law, is afforded to the undertakers, who are empowered to detain the vessel or float of timber "until sufficient security has been given for the amount of damages done by the same."

These most important provisions plainly supply the motive for the legislation, whatever be the issue of the controversy as to the extent of its action; and I think it is vain to allege that we cannot suggest for it a sufficient motive, without straining its effect to work confessed injustice.

I do not stay to consider the argument that this construction, approved by the Court of Appeal, should be rejected, because a float of timber is not usually "in charge" of any one, as a vessel is, and that Parliament cannot, therefore, be supposed to have restricted its view to cases in which the instrument of injury is derelict. The first answer is, that floats may be and are often "in charge," not, perhaps, of such a "master" as governs a vessel, but of other persons such as the statute takes care to mention. I do not think that they are so guarded only on the *Rhine* and the *Danube*, where populations live upon them. And next, the statute deals with the vessel and the float of timber, *quoad* the "charge" of them, precisely in the same way, and the observations I have made as to the first will, if they have force, be equally applicable to the second.

Lastly, my Lords, you may have noted that my reasoning has not been precisely that of the Court of Appeal, and that I have not based it altogether upon the legal doctrine as to the act of God. That doctrine is founded on the view, which commends itself alike to equity and reason, that liability should not be imposed, unless in special circumstances, or where public interests imperatively require it, for consequences which are not wrought by human will or act, and for which no human being is morally responsible. There are exceptions to its application, as when a man voluntarily contracts, with full opportunity of anticipating possible results, to do that from doing which he may be disabled by inevitable accident; or when, as is said, the repairing of sea-walls is rendered imperative by prescription, notwithstanding inevitable accident; and in various other cases.

And I am not at all prepared to say that the Legislature has not full power, if it be so minded, to declare that a proceeding it forbids, or a proceeding it commands, shall not be justified—in the commission of the one or the omission of the other—because the result was caused by the act of God. A law so providing we should be bound to enforce: and if, in the case before us, the statute was universally applicable, as the Appellants contend, the unhappy shipowner must have submitted to its hard infliction. As I have said, I think that it is not so applicable, and that, in his circumstances, it does not apply. And it seems proper to suggest that we should not—upon any phraseology of a doubtful character, or without the clearest and most unequivocal expression of legislative intention, or if we may anywise reasonably interpret that intention in another sense—assume that a maxim so ancient, so well established, and so accordant with the moral sense of mankind, has been set at nought by the statute before us.

In the view I have presented to your Lordships, the only case cited as touching the present (*Dennis* v. *Tovell* (1)) has no application to it. There, the vessel was not derelict, and the owner may have properly been held liable. Here, on the other hand, in the words of Baron *Pollock*,—" Out on the high seas she met with certain risks and injuries which compelled her crew to leave her, and she became derelict." And, in my judgment, this ship should be dealt with as if it had been abandoned at the antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at *Sunderland*.

On the whole, I think that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed.

LORD BLACKBURN :—

My Lords, I have had very great doubt and hesitation in this case, and have, while considering it, changed the opinion I at first held.

The question raised depends on the true construction of three sections of the *Harbours, Docks, and Piers Clauses Act*, 1847, 10 Vict. c. 27, namely, sects. 74, 75, and 76. These are part of a set of clauses gathered together under one head, viz., " Protection of the Harbour, Dock, and Pier, and the vessels lying therein, from fire or other injury." I do not think any other clause in the Act throws light on the construction of those sections; nor do I think that the construction put upon these sections will have any legitimate bearing on the construction of sections in other parts of the Act, such as sect. 56, contained in the clauses relating to the powers of harbour, dock, and pier masters, though no doubt the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that or any other enactment.

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(1) Law Rep. 8 Q. B. 10.

My Lords, it is of great importance that those principles should be ascertained; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer than by referring to the old rules of pleading as to innuendoes in cases of defamation. Those rules, though highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they *primâ facie* bore, unless it was supported by an inducement or preliminary averment of facts, and an averment that the libel was published, or the words spoken, of and concerning those facts, and of and concerning the Plaintiff as connected with those facts. If those preliminary averments were proved, words which *primâ facie* bore a very innocent meaning might be shewn to convey a very injurious one, and it was for the Court to say whether, when used of and concerning the inducement, they bore the meaning imputed by the innuendo. See the notes to *Craft* v. *Boite* (1). The Legislature has rendered it no longer necessary to set out on the record the facts and the *colloquium* necessary to support an innuendo; they are now only matter of proof on the trial; but the principle remains.

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(1) 1 W. San. 246 b.

In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs; and therefore evidence is admissible to shew all that he knew, and then the Court has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family.

In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves* v. *Legg* (1). In neither case does the Court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is.

And this, as applied to the construction of statutes, is no new doctrine. As long ago as *Heydon's Case* (2) Lord *Coke* says that it was resolved "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered; 1st. What was the Common Law before the Act? 2nd. What was the mischief and effect for which the Common Law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy." But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious; and I believe that it is not disputed that what Lord *Wensleydale* used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince

(1) 9 Exc. 709.

(2) 3 Co. Rep. 7 b.

the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear. In *Allgood* v. *Blake* (1), in the judgment of the Exchequer Chamber (which I had the honour to deliver), as to the construction of a will, it is said: "The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great, as to justify the Court in putting on them another signification, which to that mind seems a not improper signification of the words; whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will." My Lords, *mutatis mutandis,* I think this is applicable to the construction of statutes as much as of wills. And I think it is correct.

My Lords, in local and personal Acts there was found to be great inconvenience from the clauses being framed according to the views of the promoters' counsel, and, consequently, being very differently worded, and to remedy this a practice arose, I do not know when, but I believe about forty years ago, of obliging the promoters to submit their bills to the revision of the Chairman of Committees, who required them to make their clauses in the form he had approved of, unless some good reason was shewn for deviating from it. These forms of clauses were well known, and from the name of the noble Lord who had originated them were called Lord *Shaftesbury's* clauses. The research which my noble and learned friend opposite (Lord *Gordon*) has made shews that in the Harbours Acts, passed in 1846, the common form of

(1) Law Rep. 8 Ex. at p. 163.

the clause used was in the words of what is now sect. 74 of the *Harbours, Docks, and Piers Clauses Act*, 1847, but (except in one instance) without a proviso similar to that at the end of it. That shews, what the frame of the section would have led one to guess, that the proviso was an afterthought added to the enactment after it had been adopted. The preamble of the *Harbours, Docks, and Piers Clauses Act* declares that it is passed for the purpose of comprising, in one Act, the clauses usually contained in Harbour and Pier Acts, for the purpose of avoiding prolixity and producing uniformity. And the clause in question is one of a series for the "protection of the harbour, dock, and pier, and the vessels lying therein, from fire or other injury."

The first inquiry for your Lordships is, are we justified in putting a different construction on the words of an Act passed at the instance of particular promoters (or, as it is commonly called, an Act local, personal, and public) from that which would be put on similar words in a general Act. To some extent I think we are. If in a local and personal Act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, and which the committee would not (if it did its duty) have allowed to be introduced into such an Act, I think the Judges would be justified in putting almost any construction on the words that would prevent its having that effect. But I do not think it impossible that the Legislature can have intended in such an Act to create a new liability to damages unknown to Common Law. The creation of such a liability would be in direct furtherance of the declared object of the enactment, the protection of the piers from injury. And, on every construction of the enactment in question which I have heard suggested, the Legislature does impose on the owners a liability for damages occasioned by persons for whom they would not be liable at Common Law. At present, I cannot see my way to limiting the words in this Act, more than in a general Act; but I think that, neither in a general nor a special Act, could the Legislature have meant (if the words were at all understood) to shift the burthen of a misfortune befalling the owner of the pier, from the owner of the pier, who at Common Law would bear it, to the owner of a ship wholly free from blame, and involved, without fault of his, in a

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common misfortune. It may have been said, but can hardly have been intended to be said.

My Lords, the Common Law is, I think, as follows:—Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by shewing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner.

5 App Cas 890

But he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage. And, if he can prove that the person who has been guilty of either, stood in the relation of servant to another, and that the fault occurred in the course of the employment, he establishes a liability against the master also. In the great majority of cases the servant actually guilty of the negligence is poor, and unable to make good the damage, especially if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability; but there is also concurrent liability in the servant, who is not discharged from liability because his master also is liable. And in a very large number of cases the owner of the carriage, or ship, or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner, and is very often successful. But the Plaintiff succeeds, not because the Defendant is owner of the carriage, or ship, or float, but because those who were guilty of the negligence were his servants.

My Lords, I have described this state of the law with what is almost pedantic particularity, because I think it important to have

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it clearly before us. What I have said is really a statement of the law as laid down by *Parke*, B., in delivering the judgment of the Exchequer in *Quarman* v. *Burnett* (1), where the Plaintiff was nonsuited because the Defendants, though owners of the carriage, and actually seated in it at the time of the accident, were not the mistresses of the coachman whose negligence caused the accident.

My Lords, I have already said, that in the ordinary course of things, those employed about a ship are the servants of the owners, and in *Hibbs* v. *Ross* (2) the majority of the Court of Queen's Bench thought this was so much the case, that proof of ownership in the Defendant was *primâ facie* evidence that they were his servants, calling on him to prove an exceptional state of things shewing them not to be his servants. A case very likely to occur in a harbour, in which this would be disproved, would be where the ship was put in the hands of a shipwright to be repaired, and the shipwrights' servants in moving it into a graving dock negligently did mischief. The owner would not there be liable at Common Law. Where the owner of a ship is compelled to take a pilot on board, that pilot is not the servant of the owner, who is not liable for the negligence of that pilot; but the captain and crew remain his servants, and he is liable for their negligence, though a pilot is on board. Where no one is to blame, as where the accident is occasioned by inevitable accident, the loss at Common Law was borne by the owner of the property injured. And, lastly, the person injured has at Common Law no lien on the ship, but only a right of action against the person to blame, and also, if he was a servant, against his employer.

My Lords, reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed: and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be "answerable for any damage done by the vessel or by any person employed about the same" to the harbour. It seems to have been suggested that where a compulsory pilot was on board the mischief might very well be by his fault, and then the previous general presumption that mischief generally was due to the fault of the owners' servants, did not arise. This case, therefore, was, by the proviso, taken out of the enactment and restored to Common Law. As to the possible case of the mischief being occasioned by the servants of a shipwright, or some other substantial person, it seems to have been thought enough to give the owner the remedy over provided by the 76th section. As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at Common Law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words.

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(1) 6 M. & W. 499.

(2) Law Rep. 1 Q. B. 534. 12 Jur
NS. 812

My Lords, on reading the words of the enactments, I am brought to the conclusion that such was the scheme of legislation adopted by Parliament; the mischief being the expense of litigation; the remedy that the owners should be liable without proof of how the accident occurred. And if it had but been confined to cases in which the damages were under £50, and might be recovered before two justices as under sect. 75, I think it would be a scheme of legislation against which no very serious objection could be raised.

Dennis v. *Tovell* (1) was a case under £50, raised in the County Court and brought by appeal before the Court of Queen's Bench Without bestowing so much consideration on the case as I have now done, I joined in the judgment of the Court, which I for a long time have thought right, and which I now dissent from with great doubt and hesitation. It is impossible, however, to put any limit on the amount. The shipowner, if liable at all under this statute, is personally liable to his last farthing for the whole damage, however great, and however small may be the value of his ship. In the present case the amount is £2825, and if the statute transfers the liability for so large a sum from the Plaintiffs, to the Defendants who have done nothing wrong, there is no doubt it is a hard case on the Defendants. There is a legal proverb that hard cases make bad law; but I think there is truth in the retort that it is a bad law which makes hard cases. And I think that before deciding that the construction of the statute is such as to work this hardship, we ought to be sure that such is the construction, more especially when the hardship affects not only one individual but a whole class.

I have therefore (I do not know if I was justified in doing so) examined the reasons given by the various Judges in the Court of Appeal, with a wish to find that some of them would in my mind justify the conclusion to which they have come in favour of the Defendants. And I have tried to find some ground which had escaped their notice, on which I could advise your Lordships to uphold that decision, but for a long time without success.

It is quite true that where a duty is imposed by law, if the performance of the duty is rendered impossible by the act of God, or the king's enemies, the non-performance of the duty is excused. *Paradine* v. *Jane* (2), which is the case generally cited for that position, is one in which the point did not arise. Prince *Rupert* and his cavaliers, if they were to be considered the king's enemies, by driving away the Defendant's cattle and burning his crops, may have reduced the Defendant to poverty, but did not render the payment of his rent to his landlord impossible in any other sense than they rendered the payment of any other debt to any other creditor impossible; nor in the present case is there any impossibility in the owner making good the damage caused by the act of God, any more than if caused otherwise. The case of *Paradine* v. *Jane* (1) was one in which it was attempted to argue that the duty imposed by the contract to pay rent was subject to a condition that the tenant should not be evicted by the act of God, or *vis major*, and the really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the Courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that, in construing a statute where the Legislature might have expressed, but did not express, such an exception, the Court should introduce it. And there is no case cited, and as far as I can find no case exists, in which such a doctrine is laid down. In *Latless* v. *Holmes* (2), where an Act which was to "take effect from the passing of the Act" received the royal assent in May, it was held, by fiction of law, to relate back to the first day of the session, in the previous October, and to apply to a transaction occurring between October and May. This was contrary to two legal maxims, that a fiction of law should never be used to work injustice, and that the law compels no one to do an impossibility; but the words of the enactment were too plain, and the Court was obliged to work, not only great hardship, but, in the particular case, great injustice. And in the present case, if the object of the statute be, as Mr. Baron *Pollock* says, and as I think it is, with a view to avoid expense and delay, that the owners of the dock are not to be put to the proof of negligence, or to the proof of how the injury was occasioned, that object would be to some extent less effectually carried out by importing such an exception, which is certainly not expressed in terms.

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(1) Law Rep. 8 Q. B. 10.

(2) Alleyn, 26.

Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the Court in putting any meaning on the words which they will bear in order to avoid it. Both the late Lord Justice *Mellish*, and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man; damages for which someone is answerable at Common Law.

(1) Alleyn 26.

(2) 4 T. R. 660.

I have already said that the question whether words can bear a secondary sense different from the usual one, is one on which different minds differ. In the present case I feel no doubt that the hardship is great enough to justify putting a considerable strain on the words to avoid it; for I feel certain that if the enactment has the effect of shifting the burden of a misfortune to the piers from the owners of the property, who at Common Law would have borne it, to the owners of the ship, who are free from all blame, it is an unforseen consequence of the words used, which words, if the consequence had been foreseen, would not have been used in the enactment.

My Lords, I cannot see anything in the language of the Act to justify what was the opinion of some of the Judges of Appeal, and is, I think, adopted by Lord *O'Hagan*, that it is confined to cases in which some one is in charge of the ship, even if that exception could save the Defendants, which I do not think it would. The Defendants were by their servants in possession of the ship when it drove on the bank. It did not strike the pier till the rising tide floated it in, but it was all one transaction, and when it struck the pier it was still a ship, and the Defendants were still its owners. It is not necessary to inquire when or under what circumstances that which was once a ship becomes a mere "congeries of planks" to which the statute would not apply, farther than to say this ship cannot be treated as having become such, nor was it in my opinion in any sense a derelict.

My Lords, after much hesitation and doubt, I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words "damage done by the ship," as used in this enactment, necessarily include all expenses occasioned by misfortunes in which the ship was involved in common with the piers. Lord Justice *Mellish*, for whose judgment I have always had a degree of veneration which his lamented death permits me to express more freely than I should think seemly if he still lived, seems to have thought that these words might bear the more restricted sense of *injuria cum damno*. The declared object of the enactment is the protection of the piers, &c., from "injury," which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from "loss." If they can bear that sense, we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs.

Lord Gordon :—

My Lords, the opinion which I have formed in this case differs from that at which the majority of your Lordships and the Lords Justices of Appeal have arrived. I incline to the opinion of the Court of Queen's Bench. Having regard to the great weight due to the opinions which have been expressed by your Lordships, and also to the great weight due to the opinions of the Lords Justices of Appeal, both in their collective and in their individual capacity, I feel much distrust in my own opinion. But I have considered the case with great anxiety, not only in consequence of the views entertained by your Lordships, but also in consequence of the case involving the construction to be put on a section of an Act of Parliament—a matter which it is of importance should not be subject to conflicting views founded upon supposed expediency, and I feel that it is my duty to explain more fully than I should otherwise do, the grounds upon which I venture to dissent from the opinions which have been expressed by your Lordships, although I am aware that my doing so will have no practical effect upon the decision of this case.

The question relates to the application of the provisions of an Act passed for consolidating certain provisions usually contained in special Acts authorizing the making and improving of harbours, docks, and piers. It is a British statute applicable to *Scotland* as well as *England;* and its provisions are of much importance. Indeed we have been informed that a question has arisen connected with a pier in *Scotland,* in a case before the Common Pleas Division, *Eglinton* v. *Norman* (1), depending upon the construction of another section of the Act (the 56th), involving a large sum of money, which is likely to come before your Lordships on appeal, although that case will not necessarily depend upon the judgment to be pronounced in the present case.

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(1) 46 L. J. (Ex.) 557.

The question in this appeal arises out of the leading enactment of the 74th section, which provides that "the owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel, or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith;" and then it farther provides that the master, or person in charge, shall also, in cases of negligence, be liable; and that the undertakers may detain the vessel causing the damage till security be given to make good the damage; and it also provides "that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

The leading enactment of the 74th section is general and express, that the owner of every vessel causing damage to harbours, &c., shall be answerable for such damage, except in the single case where the vessel is in charge of a pilot; and the question which your Lordships have to consider is, whether the words of the section are to be read and applied in their ordinary common sense meaning, or whether there is to be imported into the statute another exception than the express exception it contains, relieving the owner of a ship which at the time the damage occurred was in charge of a duly licensed pilot, an exception, viz. from liability in cases where the damage was caused by the vessel through the act of God, or, as it is sometimes expressed, *vis major*.

It may be mentioned that this 74th section was the subject of construction in the case of *Dennis* v. *Tovell* (1). That case having involved a sum under £50 was decided in the County Court, but was taken by appeal before the Court of Queen's Bench, who dismissed the appeal with the approval of the Lord Chief Justice *Cockburn*. That previous decision of the Queen's Bench prevented that Court from reconsidering in the present case the 74th section; but leave was granted by their Lordships to take the appeal to the Lords Justices, which led to their Lordships' judgment, the subject of the present appeal to your Lordships' House.

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(1) Law Rep. 8 Q. B. 10.

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The exemption from liability on the part of the owner when his vessel is under charge of a licensed pilot, may be, it appears to me, regarded as strengthening the express words of the leading enactment of the 74th clause, in accordance with the brocard, *exceptio probat regulum.*

The first consideration to be attended to in reading the 74th clause judicially, is whether the words of the clause are express, intelligible, grammatical, and unambiguous. I submit for your Lordships' judgment that the leading words of the 74th section have all these characteristics. In my humble opinion the word "answerable" is merely an equivalent for "liable"; and I observe that their Lordships in the Court of Appeal deal with the expression as having that meaning. And no argument was addressed to your Lordships from the bar on the part of the Respondents to shew that the word was capable of any other construction. I think the section in question itself shews that the words are synonymous. For while it enacts that the owner shall be "*answerable*" it likewise enacts that the owner or person in charge shall "*also* in cases of negligence be *liable*;" and then it provides that "nothing herein contained shall extend to impose any *liability* for any such damage upon the owner" where the vessel should be in charge of a pilot.

The next matter for consideration is, what are the duty and the province of a Court of Law when ascertaining what effect is to be given to the 74th section, which, in my opinion, is of the express and unambiguous character already stated; and in expressing an opinion upon this question your Lordships are at present officiating not in your legislative character, but as the Supreme Court of Appeal, in a judicial capacity.

Blackstone, the highest constitutional and legal authority with reference to the law of *England,* when treating of statute law states (vol. i. page 89), "where the Common Law and a statute differ, the Common Law gives place to the statute." And again, (at page 91), "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a

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statute is unreasonable the Judges are at liberty to reject it; for that were to set the judicial power above that of the Legislature which would be subversive of all government." Mr. Justice *Byles* (in the case of *Birks* v. *Allison* (1)) stated that the "general rule for the construction of Acts of Parliament is that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense." Chief Justice *Jervis* (in the case of *Abley* v. *Dale* (2)) stated, "If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." Mr. Justice *Cresswell* (in the case of *Biffin* v. *Yorke* (3)) states, "It is a good rule in the construction of Acts of Parliament that the Judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words."

In a recent case before your Lordships' House, *Hutton* v. *Harper* (4), where the construction of a statute incidentally arose, Lord *O'Hagan* said: "The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates, unmistakeably, the purpose of the Legislature. When the words are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them."

The Lords Justices of Appeal, without stating that the leading enactment of the 74th section is not express, or is even ambiguous,

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(1) 13 C. B. (N.S.) 23; 32 L. J. (C.P.) 51. Affm 11 S. 694

(2) 11 C. B. 391; 21 L. J. (C.P.) 104.

(3) 6 Scott, N. R. 235; 12 L. J. (C.P.) 162.

(4) 1 App. Cas. 464, at p. 474.

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gave effect to the present Respondents' contention that the statute must be read as if it contained an express provision that the liability for damage should not attach to the owner, where the damage had been caused by what is called the act of God, which in the present case means stress of weather. Their Lordships proceeded upon the ground that such an exception applies to all cases where a duty is imposed, unless expressly included; and they hold that the same rule was applicable to Acts of Parliament; and farther, that it could not have been the intention of the Legislature, with reference to the statute in question, to impose what their Lordships regard as an unjust liability upon owners guilty of no fault or negligence. But, my Lords, no authority has been referred to, either by their Lordships or in argument from the Bar, warranting the introduction of such a qualification; and after a careful search I have been unable to find any, either in the law of *England* or of *Scotland.* It has been argued by the Respondents in the appeal, that the introduction of such an imposition upon owners of liability must be qualified by the implied condition freeing them from such liability where the damage was occasioned by the act of God, in order to give what is called a reasonable construction to the statute itself.

With regard to the supposed intention of the Legislature to express the terms of the Act subject to the implied condition, I may observe that Lord Justice *Mellish* (1) said: "I think, taking the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by Common Law, because if that is not the intention, it is not easy to see the object of the section at all." This is very high authority for presuming, in so far as it may be relevant or competent to do so, what was the intention of the Legislature in passing the Act; although I submit that where the terms of an Act are clear and unambiguous, as in the language of the enacting clause, these terms cannot be controlled by any supposed intention which may be presumed to have influenced the Legislature, or by considerations of the injustice of the result of the express terms used in the enacting clause.

(1) 1 Q. B. D. at p. 553.

In the *Sussex Peerage Case* (1) the Committee for Privileges of this House desired the opinion of the Judges, which was given, and which was unanimous. The opinion was delivered by Lord Chief Justice *Tindal*. In the course of it the Lord Chief Justice said: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver." The opinion delivered by the Lord Chief Justice was approved of by the Lord Chancellor (*Lyndhurst*), and by Lords *Brougham, Cottenham, Denman*, and *Campbell*. And in the Scotch appeal, *Fordyce* v. *Bridges*, in this House (2), with reference to the construction of the *Apportionment Act*, the provisions of which, it was argued, were quite inapplicable to the law in *Scotland*, Lord *Brougham* stated: "We must construe this statute by what appears to have been the intention of the Legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."

I think, in accordance with these authorities, that in such a case as the present, where the words are clear and distinct, we must judge of the intention of the Legislature from the words of the Act itself. But if it was relevant or competent to speculate as to what truly may have been the intention of the Legislature in passing the 74th section apart from the words of the statute, it appears to me, with great deference, that the intention of the Legislature may have been, amongst others, to give that amount of protection to the owners of piers which the words of the 74th section clearly imply, and so relieve them from the often difficult questions of evidence as to whether the damage was caused by the fault or negligence of the owners of vessels or their servants, in which cases (I mean if the damage was caused by the negligence of owners of vessels or their servants) there could be no doubt of their liability apart from the words of the statute.

It seems to me to be not unimportant, in considering the question of intention, to consider the course of legislation with reference to Acts for the construction of piers and harbours prior to the passing of the consolidating Act, with which your Lordships are now dealing. That Act was passed, as the preamble bears, because it was "expedient to comprise in one Act sundry provisions usually contained in Acts of Parliament authorizing the construction or improving of harbours, docks, and piers, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for ensuring greater uniformity in the provisions themselves."

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(1) 11 Cl. & F. 143.

(2) 1 H. L. C. 1.

In accordance with a suggestion made in the course of the discussion, I have looked into the private Acts which were passed for the construction of piers and harbours during the session 9 & 10 Vict. (1846), the session immediately preceding that in which the consolidating Act was passed, and I find that there were twelve Acts passed in that session, each of which contained a clause imposing liability for injury done to harbour works in the same general terms as those of the 74th clause of the consolidating Act; and I presume, from the apparently stereotyped terms of the clauses in these Acts, that the Acts passed in previous sessions had contained clauses to the like effect. I observe that the *Wear* Commissioners in that session obtained a special Act (c. 13), and it contains the clause to which I have referred, making an exception when a pilot was on board. The provision imposing liability for damage to pier and harbour works must, therefore, I think, have been familiar to the Legislature; and that circumstance appears to me to strengthen the presumption that the Legislature did intend, by the clause which your Lordships are considering, to impose the liability in the general terms it has done. And as the Act affected so great interests as the piers and harbours of the *United Kingdom*, it is to be presumed that its terms would be thoroughly canvassed and carefully considered in its passage through Parliament, specially with the view of preventing any limitation, in the case of future piers and harbours, of rights which had been conferred on owners of piers by previous legislation.

The risk of causing damage to piers or harbours is, I apprehend, a risk which it would be competent to owners of vessels to insure against, although it might require an alteration of the existing form of policy by making an express provision against the risk of such damage. The supposed injustice of the 74th section thus resolves itself into a mere question of payment of money to cover the premium to secure against the risk of such damage.

My Lords, applying the authorities to which I have referred to the present case, I am humbly of the opinion, which I entertain with very great hesitation after the opinions which have been expressed by your Lordships, that the statute ought not to be construed as if it contained an exemption from liability for damage where it occurred from the act of God. The words of the statute appear to me to be express and unambiguous, and being so, I think they should be read according to their ordinary construction. But in accordance with the opinions expressed by your Lordships, the judgment will fall to be affirmed.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th July, 1877.

Solicitors for the Appellants: *J. W. Hicken.*
Solicitors for the Respondent: *Johnson & Weatherall.*

[HOUSE OF LORDS.]

JOSEPH FLETCHER, JOHN MUSGRAVE, AND CHARLES FISHER . . . . . } APPELLANTS;

AND

SAMUEL WAGSTAFF SMITH . . . . RESPONDENT.

H. L. (E.)
1877
July 5, 27.

11 Ch D 78
12 Ch D 2
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Mine—Damage—Water—Construction of New Channel—Overflow from Storms.

A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence.

But where for his own convenience he does something, *e.g.*, divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream, of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability.

Circumstances which will create liability in such a case.

THIS was an appeal against a decision of the Exchequer Chamber, which had affirmed a previous decision of the Court of Exchequer.

Smith was the Plaintiff in an action of trespass. The declaration contained four counts. The first was for trespass generally, the second alleged that the Plaintiff was possessed of a close called *Crossgill*, and of the mines under the same, and that the Defendants were possessed of an adjoining close called *Goose Green*, and of the mines under the same, being in communication with, but on a higher level than, the Plaintiff's mines, and alleged that the Defendants wrongfully made holes in the surface of their land, and thereby wrongfully introduced quantities of water into the Plaintiff's mines. The third count charged that the Defendants permitted certain holes in the surface of their lands to remain open after such holes had ceased to be required for the proper working of the Defendants' mines, whereby the mines of the Plaintiff were flooded. The fourth count stated that the Defendants had negligently diverted a watercourse flowing through their land without making a proper and sufficient channel to prevent it from flooding the adjacent land, by reason whereof it had flowed into the Defendants' mines and so into the Plaintiff's mines, and had flooded them. The Defendants pleaded several pleas, and also demurred to the second, third, and fourth counts. Replication and joinder in demurrer.

The cause was tried in 1872 before Mr. Justice *Lush*, when it was proved that the Defendants' mine was on the higher, the Plaintiff's on the lower level, that the Defendants had diverted the course of a stream, and had made a new course for it, that in their workings of their own mine they had occasioned certain portions of the surface to sink into holes, though in doing this they had not acted negligently, that on the happening of a very heavy downfall of rain the water had overflowed its new course, got into the holes on the surface, and passed into the Defendants' mine, and thence flooded the Plaintiff's mine. It was contended for the Defendants that they were thus shewn not to be in fault, and that they were entitled to the verdict, or that a nonsuit ought to be entered. The learned Judge, however, ruled that as the Defendants had by their own acts occasioned the water to collect in the surface holes, and to overflow, they were absolutely liable for the consequences, and he rejected the evidence proposed to be given that the Defendants had used all reasonable precautions against an ordinary overflow of water, and that this mischief was entirely to be attributed to a rainfall of exceptional severity (1). The Plaintiff accordingly obtained a verdict, against which a rule was obtained for a nonsuit or a new trial, but which was sustained, after argument, in the Court of Exchequer (2). The case was then taken to the Exchequer Chamber, where the Court so far sustained the decision as to refuse a nonsuit, but so far reversed it as to direct that a new trial should be had (3).

The second trial took place before Mr. Baron *Pollock* at the *Cumberland* Summer Assizes in 1874, when evidence of the very excessive rainfall was given, and the learned Judge left five questions to the jury: "1. Was the mine flooded from natural causes or from anything done by the Defendants.—Answer. From the act of the Defendants. 2a. Was the flooding occasioned in the whole or in part by the diversion of the stream.—Answer. In part, and, chiefly, by the diversion of the stream. 2b. Or by the deficient condition of the new channel and the banks thereof.—Answer. And by the condition of the new channel. 2c. Was the stream in its diverted course more likely to overflow in time of flood, and would its overflow do more damage to the Plaintiff than if it had been allowed to flow in its former channel.—Answer. The stream in its diverted course would be more likely to overflow, and so do more damage to the Plaintiff. 3. Was the flooding occasioned by the failure of the diverted channel, or other means, to intercept the surface water on the broken ground.—Answer. Yes. 4. Was the flooding occasioned, not by the insufficiency of the channel, but by the result of the exceptional rainfall.—Answer. The rainfall was exceptional, but the new channel was insufficient. 5. Was what was done by the Defendants done in the ordinary, reasonable, and proper working of their mine.—Answer. Yes, if the diversion of the stream had been properly executed."

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(1) It was said that the rainfall amounted to three inches in thirty-four hours, the general average at that place being forty-five inches in a year.

(2) *Nom. Smith* v. *Fletcher*, Law Rep. 7 Ex. 305.

(3) Law Rep. 9 Ex. 64.

The verdict was entered for the Plaintiff. Leave was reserved to enter a verdict for the Defendants, but a rule for that purpose was, on the 22nd of November, 1875, discharged; and, on appeal, that decision was, on the 21st of February, 1876, affirmed. This appeal was then brought.

The Attorney-General (Sir *J. Holker,* Q.C.), and Mr. *Baylis,* Q.C. (Mr. *Vincent* was with them), for the Appellants, the Defendants below:—

The findings of the jury were substantially in favour of the Defendants, and the verdict ought to be entered for them. Where every reasonable precaution had been taken to prevent mischief from an overflow of water, the fact that it did overflow in consequence of an unprecedented storm of rain was not to be imputed as a fault to the Defendants, but was an act of nature, for the consequences of which they were not responsible. The case of *Rylands* v. *Fletcher* (1) was not adverse to the Defendants. On

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(1) Law Rep. 3 H. L. 330.

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the contrary, it laid down a principle which the evidence at the second trial of this case shewed to be applicable in their favour. They had used their land in the ordinary manner of its use, and if mischief happened thereby they could not be held liable. They had not brought themselves within the application of the other rule in the case, for they had not brought upon their land anything in itself mischievous, and then left it without taking proper precautions against the mischief. They had not brought the water on the land, it was there before, they had merely diverted its course, and, in doing so, they had taken every reasonable precaution to prevent mischief, for the evidence shewed that the new course of the stream was much more capacious than the old, and therefore, according to all ordinary calculation, would carry off the water more quickly. One witness, indeed, expressly stated that "the diversion was quite sufficient to take all the water in ordinary times." The Defendants were not responsible for extraordinary times, and the occasion in question was shewn to be one of the most extraordinary. *Wilson* v. *Waddell* (1), a very recent decision of this House, was entirely in favour of the Defendants. It was there held that the right to work mines was a right of property, which, being properly exercised, begot no responsibility; and, therefore, when the ordinary working of a mine caused a subsidence of the surface land, a consequent flow of rain water into a lower coal-field gave no right of action. Here what had been done, had been so done in the exercise of the ordinary rights of a mine owner; it had been done in a careful and proper manner, and the means provided for the flow of the water were "more capacious than before." There was, consequently, no reason either in fact or law for holding these Defendants liable. The principle which all these later cases had developed was stated years ago in *Smith* v. *Kenrick* (2), namely, that where there were owners of two adjoining mines, neither being subject to a servitude to the other, each had a right to work his own mine in a manner most convenient and beneficial to himself, although the natural consequence might be that some prejudice would accrue to the owner of the adjoining mine, so long as that did not arise from any negligence or misconduct. That case was cited and commented on and adopted in *Rylands* v. *Fletcher* (1). *Baird* v. *Williamson* (2) was also cited there, and adopted, and that case declared that the owner of the upper of two adjoining mines was not liable for injury by water flowing, by gravitation, into the lower mine from works conducted by him in the usual and proper manner. There was no duty on a mine owner, or other person, to take precautions against the possible operations of nature, nor against the acts of other people. So that, even under the words of a statute (8 Vict. c. 20, s. 68) made for the protection of railway passengers, it was held that no duty was imposed on a railway company to keep up fences along the line so as to prevent cattle straying on the line, and so occasioning danger. *Buxton* v. *The North Eastern Railway Company* (3). The case of *Williams* v. *Groucott* (4) was not an authority against the Defendants, for the question there depended entirely on the relative rights of the owner of land and of a person who had a special right to sink a shaft on that land in order to work the mine below. That case was, therefore, entirely inapplicable here. But *Nichols* v. *Marsland* (5) was clearly in favour of the Defendants, for there it was held that one who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water if that is caused by the act of God, or *vis major*, as by an extraordinary rainfall which could not have been anticipated. And that was held although, if it could have been anticipated, the effect might have been prevented. And the principle was in reality admitted in *Crompton* v. *Lea* (6), where a bill to prevent certain works in a mine was held sustainable only because there was a distinct allegation that the works could not be executed without occasioning the damage sought to be prevented. Nothing of that sort could be said here. The watercourses were well executed, they were larger and more capacious than the old ones, and nothing but this extraordinary rainfall, which no one could have foreseen, and against which no one could have provided, had occasioned the mischief.

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(1) 2 App. Cas. 95.

(2) 7 C. B. 515; 18 L. J. (C.P.) 172.

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(1) Law Rep. 3 H. L. 330, 335, 339.
(2) 15 C.B. 376; 33 L. J. (C.P.) 101.
(3) Law Rep. 3 Q. B. 549.
(4) 4 B. & S. 149. 9 Jur. N.S. 1257
(5) 2 Ex. D. 1.
(6) Law Rep. 19 Eq. 115.

Mr. *Crompton*, for the Respondent:—

There was nothing in the cases cited to prevent the Plaintiff from recovering, and the evidence and the findings of fact shewed that the mischief had really arisen from the act of the Defendants in not having in their new watercourse sufficiently guarded against the mischief of an overflow.

July 27.

LORD PENZANCE:—

My Lords, the Plaintiff's claim in this case was for damages in respect of the injury caused to his mine by the flood water which he alleges that the Defendants wrongfully caused to flow into it. The water in question flowed down into the Defendants' own mine through certain fissures or cracks in the surface of the soil above, (and particularly through a hole known as *Paddy Murray's Cut*,) which had been caused by the Defendants having removed the soil below in the course of his mining operations, and from the Defendants' mine it flowed into the Plaintiff's.

Your Lordships cannot be asked, after the decision of this House in the recent case of *Wilson and another* v. *Waddell* (1), to hold that the Defendants are liable as for a wrongful act for thus cracking and laying open the soil above their own mine, so as to let through the rain water which might fall thereon.

Nor, indeed, although such a claim was originally made in the declaration, was it persevered in at your Lordships' Bar, but the Plaintiff's ground of complaint was narrowed to this, that the Defendants had diverted a natural watercourse which ran across and over his mine, and that the diverted watercourse had been so inefficiently constructed, that, on the occasion of certain heavy falls of rain, the water flowed over the top of the artificial bank of the watercourse, carried away a part of that bank, and, thus released, poured down in large quantities through the fissures and holes in the surface, and flooded the Plaintiff's mine.

The answer of the Defendants to this complaint was, as presented to your Lordships in argument, that the new and diverted watercourse was as efficient for carrying off the water as the old one had been; but that the rainfall and consequent flooding were of so unusual and exceptional a character, that neither the new, nor the old watercourse if that had been in existence, could possibly carry off the water.

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(1) 2 App. Cas. 95.

The case has been before two juries; it seems to have been withdrawn from the first, but on the second occasion the learned Judge left several questions to the jury for their decision, the answers to which are now before your Lordships, and the contention of the Defendants is, that upon those answers, and upon such inferences of fact as your Lordships may draw from the evidence, not inconsistent with these findings, the Defendants are entitled to have the verdict entered for them.

At the threshold of the inquiry, as to the Defendant's liability to the Plaintiff, lies the question—what obligations did the Defendants incur when they diverted the natural watercourse? It is not on the one hand a question in this case, whether the Defendants were required thus to divert the watercourse before they pursued their mining operations in its neighbourhood; and, on the other hand, it is not made a ground of complaint against them that they did divert it. But, in diverting it, what were their obligations?

12 ChD 229

Was it enough to make the new and artificial watercourse as efficient, but no more so, than the old and natural one, so that whatever defects, incapacity, or otherwise, the old one had, might, without responsibility, be re-produced in the new one?

Or, secondly, were they bound (as they, for their own convenience, were making a new and artificial watercourse), to construct it in such a manner that it would be capable of conveying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality?

Or, thirdly, were they bound to make provisions for any such quantities of water as might possibly be discharged into it from any mere rainfall, however heavy, however unusual, and however contrary to all previous experience?

The choice between these three propositions is a question of interest capable of being very variously regarded, and before a decision is come to upon it, the matter should be very carefully considered.

For my own part, I incline to think that the second proposition defines the true measure of the Defendants' obligations, but I desire to express no positive opinion to that effect.

For I submit to your Lordships that you are not called upon to give your adhesion to any one of these propositions on the present occasion, inasmuch as whichever of the above three propositions may properly define the Defendants' obligations, it is plain, from the undisputed facts of the case, that they did not fulfil the last of them, and it is, I think, equally plain that the jurors have found that they did not fulfil either of the other two.

I will shortly point out that this is so.

The jurors first say generally that the flooding was caused "by the act of the Defendants" as distinguished from "natural causes." In their next answer they say the flooding was caused chiefly by "diverting the stream" and "by the condition of the new channel." In other words, they affirm that it was by directing the stream into a channel, the condition of which was not sufficient, that the major part of the mischief was done.

These answers, if they stood alone, would leave it open to be contended that the "condition" which they considered insufficient was a condition which, although sufficient to meet the requirements of any rainfall which might reasonably be expected, was yet insufficient to encounter the pressure of an exceptional rainfall such as could not be reasonably anticipated.

But this view of the meaning of the jury is no longer possible, when their answer to question four is considered. The question was pointedly put to them, "Was the flooding occasioned *not by the insufficiency* of the channel, *but by the result of exceptional rainfall*"? and the answer is, "The rainfall was exceptional, but the new channel was insufficient." To which they add, in their fifth and last answer, "What was done by the Defendants would have been done in the ordinary, reasonable, and proper working of the mine, if the diversion of the stream had been *properly executed*."

These answers make it clear, I think, that the insufficient condition of the new channel to which the jurymen were referring was an insufficiency to cope with a rainfall *not exceptional*, or, in other words, a rainfall such as might by a reasonable man be anticipated.

The remaining point, which was chiefly, if not wholly, relied upon in argument before the House, was this, that the new watercourse was as capable of carrying off the waters, on the occasions in question, as the old one would have been. This question, it was argued, had never been presented to the jury, whereas the evidence upon it was largely, if not wholly, in favour of the Defendants.

As regards the weight of evidence, I consider that it is not open to this House upon this appeal (which is against the discharge of a rule obtained by the Defendants to enter the verdict for them upon the findings of the jury), to entertain the question whether the verdict was against the weight of evidence.

And, as regards the contention that the comparative capacities of the two watercourses were never submitted to, or adjudicated upon, by the jury, I conceive that it is wholly untenable in the face of the following question put by the Judge, and answer given by the jury:—"Was the stream in its diverted course more likely to overflow in time of flood, and would it overflow and do more damage to the Plaintiff than if it had been allowed to flow in its former channel?"—Answer: "The stream in its diverted course would be more likely to overflow and so do more damage to the Plaintiff."

Nor can it be said that the attention of the jury was not called to the full meaning and understanding of this question? For in summing-up the learned Judge said, "Therefore I ask this question, whether the flooding was occasioned by the diversion of the stream, or by the deficient condition of the new channel, or the banks thereof? To make that clear I may also ask you, was the depth of the channel such as to make it as capacious and efficient as the former channels?"

It is clear therefore, I think, that the jury considered the new channel not as efficient as the old one would have been. And although it seems to have been proved as a matter of measurement that the cubical capacity of the new channel surpassed that of the old, it must be borne in mind that the bends and curves in the new channel, which did not exist in the old one, may have had the twofold effect of impeding the rapid discharge of a great body of water, and of creating by a great accumulation of water an unusual strain upon the banks, at the points where these bends occurred, causing the overflow of the water and the gradual destruction of the banks themselves. The jurors, several of whom appear to have viewed the spot, may well therefore have been justified in coming to a conclusion against the sufficiency of the new watercourse as compared with the old, notwithstanding the evidence as to its cubical capacity upon which the Defendants' counsel so strongly relied.

For these reasons I submit to your Lordships that the decision of the Court of Appeal, affirming the decision of the Exchequer Division, should be affirmed by this House, and the appeal against it be dismissed with costs.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, I do not think it necessary in this case to say more than that I have attentively listened to the opinion so clearly expressed by my noble and learned friend; I have indeed had previously an opportunity of considering, upon paper, that opinion, and it so fully expresses the views which I entertain as to this case, that I shall not say more than that I entirely concur in the motion which he has proposed to your Lordships.

LORD HATHERLEY :—

My Lords, I too have had the advantage of perusing the opinion which has just been delivered, and concurring, as I do entirely, in the view which he has there expressed, I am content to say that I agree in the decision proposed to be pronounced.

LORD BLACKBURN :—

My Lords, I also entirely concur in the opinion.

LORD GORDON :—

My Lords, I also concur and, I think it unnecessary to add many observations.

My Lords, the circumstances of this case are different from those of *Wilson* v. *Waddell*, decided by your Lordships on the 1st of December, 1876, on an appeal from the Court of Session in *Scotland*.

The facts of this case have been brought out very clearly and distinctly in the opinion which has been expressed by my noble and learned friend opposite, Lord *Penzance*. The contention of the Appellants at your Lordships' Bar was that the new channel was sufficient for carrying off the water, had it not been for the result of an exceptional rainfall, against which, it was contended, that there was no duty imposed upon them to provide. But, as has been pointed out by his Lordship, this matter was submitted to the jurors by the Judge who presided at the trial; and they found that the damage was caused by the insufficiency of the new channel, and that the diversion of the stream had not been properly executed. I think the result expressed by his Lordship is fully supported by the findings of the jury, to which he has referred.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th July, 1877.

Solicitors for Appellants: *Gregory, Rowcliffes, & Co.*
Solicitor for Respondent: *J. R. Musgrave.*

[HOUSE OF LORDS.]

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July 12, 13, 17, 27.

THOMAS DOOLAN . . . . APPELLANT;

AND

THE DIRECTORS, &c., OF THE MIDLAND RAILWAY COMPANY . . . . . . } RESPONDENTS.

Railway Acts—Traffic—Land and Sea Carriage—Illegality.

CPD 284
10 QBD 256

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The *Traffic on Railways and Canals Act*, 1854 (17 & 18 Vict. c. 31), applied to the whole traffic upon railways, and not merely to their passenger traffic, but only applied to traffic on railways or canals.

The *Railways Clauses Act*, 1863 (26 & 27 Vict. c. 92), s. 31, extends the Act of 1854 to steam vessels, and the traffic carried on thereby, which vessels railway companies own or work.

The *Railways Regulation Act*, 1871 (34 & 35 Vict. c. ~~119~~), s. 12, applies to cases where a railway company, under a contract to carry persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the company nor worked by the company, and the company becomes liable for damage in like manner as if the vessel had belonged to the railway company.

The 7th section of the Act of 1854 did not allow of the limitation of the liabilities of railway companies, except by such "conditions" as should be held by a Court or Judge to be just and reasonable, and be embodied in a special contract, which should be signed by the owner of the goods.

The word "servants" in the *Railway and Canal Traffic Act*, 1854, s. 7, means not merely servants, properly so called, but also the agents (not strictly servants), employed by railway companies to do for them work which they are under a contract with others to perform.

Machu v. *The London and South Western Railway Company* (1) approved.

A railway company made contracts to carry animals from a port of *Ireland* to a town in *England*, on "through" tickets. The paper or ticket contained, in substance, the following condition: "that with respect to any animals, &c., booked through, by them or their agents, for conveyance partly by railway and partly by sea, or partly by canal and partly by sea, such animals, &c., will only be so conveyed on the condition that the company shall be exempt from any liability for any loss or damages which may arise during the carriage of such animals, &c. by sea, from the act of God, &c., accidents from machinery, &c., and all and every other damages and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be responsible for loss of, or damage to, animals, &c., arising from damages or accidents of the sea, or of steam navigation, the act of God, &c., jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels:"—

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(1) 2 Ex. 415.

Held, that the words "master and crew of the company's vessels," in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself; and that the condition was unreasonable and void.

If a railway company is guilty of an illegality by working steamboats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steamboats.

THIS was an appeal against a decision of the Court of Exchequer Chamber in *Ireland*, which (*diss.* Lord Chief Justice *Whiteside*) had reversed a judgment of the Court of Common Pleas there (1).

The Plaintiff was a cattle dealer, who had sent sixty-three cattle to the Defendants to convey to *England*. The cattle were taken on board the *St. Columba* steamer, which was employed by the Defendants to make the voyage between *Dublin* and *Liverpool*, and, on arriving in *England*, the cattle were to be conveyed by the Defendants' railway to *St. Ives*, in *Huntingdonshire*. The vessel was wrecked on the *Skerries Rock*, near *Holyhead*, and the cattle lost.

The contract note stated in the usual way the number of cattle to be conveyed, and one part of the writing thereon was in the following terms:—

"It hereby agreed between the undersigned and the *Midland Railway Company* that the animals named on the other side are to be conveyed only upon the conditions mentioned upon the back of the invoice handed to the undersigned by the company's agent."

On the back portion of the contract note handed to the consignor were certain "Conditions of Carriage," the third of which began in this way: "Under clause 7 of the Act intituled 'An Act for the Better Regulation of Traffic on Railways and Canals,'

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(1) Ir. Rep. 10 C. L. 47.

17 & 18 Vict. 1854, it is provided;" and then came the enactment limiting the amount to be recovered, in case of injury to horses and cattle, to a certain sum unless a higher value had been previously declared and an increased rate paid. The condition went on, "In no case will the company be liable for injury caused by fear or restiveness of animals. Animals are carried only in conformity with this notice." The last of the "Conditions" was in the following terms:—

> "That with respect to any animals, &c., booked through for conveyance partly by railway and partly by sea, such animals, &c., will only be so conveyed on the condition that the company shall be exempt from liability for any loss or damages which may arise during the carriage of such animals, &c., by sea, from the act of God, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be accountable or responsible for loss of, or any damage or injury to, animals, &c., intrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master, or any officers or crews of the company's vessels."

In addition to the ordinary issues of fact, the Defendants pleaded (thirdly) that the cattle were delivered to them to be carried from *Dublin* to *St. Ives* under a through-booking arrangement, upon the terms that the Defendants should not be accountable for injury to the cattle while shipping, during the sea passage, or landing; and that the injury to the cattle was occasioned during one of these periods. By the fourth plea the Defendants alleged that the delivery of the cattle for carriage to *St. Ives* was upon the terms that the Defendants would not be accountable for any loss or injury arising from improper, careless, or unskilful navigation, or any default or negligence of the master, officers, or crews of the company's vessels, and that the loss here was a loss arising from

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improper, careless, or unskilful navigation, or from some default of the master, officers, or crew of the vessel. In the sixth plea there was a similar allegation, averring, also, that the condition therein mentioned was a reasonable condition. The ninth plea stated that the Defendants were not authorized to build, buy, hire, or use, maintain, or work, or to enter into arrangements for using, &c., steam vessels for the purpose of carrying on a communication between *Dublin* and *Liverpool*, and that the cattle were delivered to the Defendants under a through-booking arrangement to be carried from *Dublin* to *Liverpool* by sea, in the steamship *St. Columbia*, being a vessel which did not belong to, and was not hired, used, maintained, or worked by the Defendants, and to be carried from *Liverpool* to *St. Ives* on the Defendants' railway, upon the conditions that the Defendants would not be accountable for loss or injury from improper, careless, or unskilful navigation, and that the loss complained of arose from improper, careless, and unskilful navigation.

The Plaintiff demurred to the different pleas which alleged the conditions on the ground that such conditions were neither just nor reasonable.

The Defendants demurred to the replications on the ground that it was immaterial whether the conditions were reasonable or just, and that no new facts were shewn to obviate or repel the legal effect of the Defendants' averments (1).

The defences intended to be raised were in substance these: first, that the Defendants were protected by the conditions, even though the conditions were unreasonable, and that the 17 & 18 Vict. c. 31, s. 7, and the 31 & 32 Vict. c. 119, s. 14, and the 34 & 35 Vict. c. 78, s. 12, Acts regulating traffic on railways and canals (2), did not apply to the case; secondly, that the conditions were reasonable.

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(1) There had been a case arising out of the same circumstances, and where the same questions were raised, and in that case, *Moore* v. *The Midland Railway Company* (Ir. Rep. 8 C. L. 232; Ibid. 9 C. L. 20), the decisions first on the demurrers, and next on the case itself, had been in favour of the Plaintiff. There was no appeal in that case.

(2) 17 & 18 Vict. c. 31, s. 7 (*Railway and Canal Traffic Act*, 1854): "Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any horse, cattle, or other animals," &c., "occasioned by the

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The cause was tried before Lord Chief Baron *Palles,* at the *Kildare* Summer Assizes, 1874, when the jury found the loss was occasioned by negligence of the Defendants' servants, and not

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neglect or default of such company, or its servants, notwithstanding any Notice, Condition, or Declaration, made and given by such company, contrary thereto, or in anywise limiting such liability: Every such Notice, Condition, or Declaration, being hereby declared to be null and void." Then came the provision that such conditions might be made as should be adjudged, by a Court or Judge "before whom any question relating thereto shall be tried, to be just and reasonable." Then followed a proviso limiting the value of the animals, except upon payment to the company for the increased risk—the percentage or increased rate of charge to be notified in the manner prescribed by the 11 Geo. 4 & 1 Wm. 4, c. 68—the proof of the value to be upon the person claiming compensation: "Provided that no special contract between the companies and any other parties respecting the receiving, forwarding, and delivering" of any animals, or goods, &c., "shall be binding upon or affect any such party unless the same be signed by him," &c., or the person delivering such animals or goods. And this Act was not to alter the rights of any company under the 11 Geo. 4 & 1 Will. 4, c. 68.

26 & 27 Vict. c. 92, s. 30 (*Railways Clauses Act*, 1863): "Where a railway company is authorized to build, buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working" steam-vessels, the tolls taken were to be made so as to secure equality.

Sect. 31: "The provisions of the *Railway and Canal Traffic Act*, 1854, so far as the same are applicable, shall extend to the steam-vessels and to the traffic carried on thereby."

31 & 32 Vict. c. 119 (*Regulation of Railways Act*, 1868), s. 14: "Where a company by through booking contracts to carry any animals, luggage, or goods, from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea from the act of God, the King's enemies, fire, accidents from machinery and boilers, and steam and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight-note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition."

Sect. 16: "Where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam-vessels for the purpose of carrying on a communication between any towns or ports, and to take toll," and there was to be equality of treatment in that respect of all passengers carried—and then followed this enactment: "The provisions of the *Railway and Canal Traffic Act*, 1854, so far as the same are appliby the dangers of the seas. The Lord Chief Baron ruled that the contract was within the 17 & 18 Vict. c. 31, s. 7, and that the conditions were unreasonable. The verdict was therefore entered for the Plaintiff for £765 damages. Leave was reserved to the Defendants to move to enter the verdict for them if the Court should think the defence sustainable. The Defendants, in Michaelmas Term, 1874, obtained a conditional Order for that purpose, and after argument the Court of Common Pleas ordered the verdict to be entered for the Plaintiff, and upon the point of an application for a new trial discharged the rule. The case was then taken to the Court of Exchequer Chamber where (Lord Chief Justice *Whiteside, diss.*) the judgment of the Court of Common Pleas on the demurrers and on the motion for a new trial was reversed (1), the conditional Order was directed to be made absolute, the verdict for the Plaintiff to be set aside, and the verdict to be entered for the Defendants, and it was farther ordered "that each party do abide his own costs of the appeal to and proceedings in this Court." This appeal was then brought.

Mr. *Macdonough*, Q.C. (of the Irish Bar), and Mr. *Benjamin*, Q.C. (Mr. *J. D. Fitzgerald* was with them), for the Appellant:—

It is admitted that the act of God, as it is called, and the act of the Queen's enemies, are excepted from those matters which render companies liable. But here neither of these causes of exemption exists. The question was distinctly left to the jury whether this loss was occasioned by the perils of the sea, or by the negligence of the Defendants' servants; and the finding was

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cable, shall extend to the steam-vessels and to the traffic carried on thereby."

34 & 35 Vict. c. 78, s. 12 (*Regulation of Railways Act*, 1840 to 1871): "Where a railway company, under a contract for carrying persons, animals, or goods, by sea, procures the same to be carried in a vessel not belonging to the railway company, the railway compana shall be answerable in damages in respect of loss of life or personal injury, or in respect of loss of or damage to, animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company: Provided that such loss of life or personal injury, or loss or damage to animals or goods, happens to the person, animals, or goods (as the cass may be), during the carriage of the same in such vessel; the proof to the contrary to lie on the railway company."

(1) Ir. Rep. 10 C. L. 47–91.

distinct and express that it was occasioned by the negligence of the Defendants' servants. To hold that on such a finding the Defendants could be exempted from liability would be to hold out a premium to negligence, which the law could never intend. But then it is said, first, that the master and crew of the vessel were not the servants of the Defendants, and consequently could not make the Defendants liable for their acts; and next, that, whether they were the Defendants' servants or not, the Defendants were protected by the conditions which they had marked on the ticket issued by them. Neither of these answers is sufficient. The steam-vessel was employed by the company, and, consequently, though not the railway company's own property, was within the words of the several Acts which allow railway companies to hire, employ, and use steam-boats, and make them liable for losses on steam-boats thus hired, employed, and used. The persons navigating them are, for such a purpose, the servants of the railway company: *Machu* v. *The South Western Railway Company* (1). When a railway company agrees with a passenger, or with a consignor of goods, for a through conveyance, the company so agreeing remains liable for the whole transit, and the liability cannot be divided: *Cohen* v. *The South Eastern Railway Company* (2), where *Stewart* v. *The London and North Western Railway Company* (3) was expressly overruled. The only exception was, when part of the through journey was to be performed in a foreign country, the laws of which and the governmental habits of which were entirely different from our own, in which case the question might, of course, be raised by what law the contract was to be governed: *Cohen* v. *The South Eastern Railway Company* (2). If a railway company chose to make a conveyance by sea a part of its undertaking, it must accept the responsibilities which Railway Acts imposed upon it.

Now, what were those Railway Acts? The first was that which was passed in 1854, and was called the *Railway and Canal Traffic Act*, 1854, the 7th section of which made a railway company liable for injury "to horses, cattle, or other animals occasioned by the neglect or default of such company or its servants," and any

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(1) 2 Ex. 415.
(2) 1 Ex. D. 217; 2 Ex. D. 253.
(3) 3 H. & C. 135. 10 Jur. N.S. 805

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notice or condition pretending to limit this liability was declared to be void. The proviso which followed admitted that special contracts might be entered into, but, to be binding, they must be declared by a Court or a Judge to be reasonable, and they were to be embodied in a writing, which was to be signed by the person delivering the animals. The 11 Geo. 4 & 1 Will. 4, c. 68, was referred to, but not any limitation of liability was adopted from that statute. The only matter that was adopted was the necessity of having a contract, if it was intended to limit it. Then came the 26 & 27 Vict. c. 92, which recognised a right in railway companies to "build, buy, or hire, and to use, maintain, and work" steam-vessels, which did not, perhaps, apply to this case, "or enter into arrangements for using, maintaining, or working" them, which had been done here; and in all such cases the *Railway and Canal Traffic Act*, 1854, was to "extend to the steam-vessels and to the traffic carried on thereby." The 31 & 32 Vict. c. 119, s. 14, would be relied on by the other side; but that section, though allowing a condition to exempt the railway companies from liability on a "through booking contract" as to animals, &c., carried partly by sea, only gave the exemption (see the section, *ante*, p. 796) in respect of certain specified matters, no one of which included the negligence of the master and crew of the vessel. Here the express finding was that that negligence was the cause of the loss; and, therefore, whatever effect was given to this restrictive clause, it could not touch this case. Then came the 16th section, which in all such cases said that there should be an equality of tolls for all passengers, and went on to declare that the provisions of the Act of 1854 should be applicable "to the steam-vessels and to the traffic carried on thereby." It was said that this did not apply to the carriage of animals; but whatever might have been the doubts raised about the mere wording of previous Acts, or of this particular section, it was removed by 34 & 35 Vict. c. 78, the 12th section of which (see *ante*, p. 797) exactly met this case. That 12th section provided that when railway companies, under a contract to carry persons, animals, or goods by sea, procured them to be carried in a vessel not belonging to the company, it should be answerable for loss of life, or personal injury, or for damage to the animals or goods, as

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it would have been answerable if the vessel had belonged to the company. There could be no doubt that this was meant to fix the liability on the railway company without permitting any question as to the legal power of the company to build, to hire, or to employ or use vessels: and taking these various Acts together, it was clear that the general provisions of the Act of 1854 were applicable, and that the various efforts of the companies to get rid of their liability had been met and provided against by the Legislature. [*Peek* v. *The North Staffordshire Railway Company* (1), and *Hodges* on Railways (2) were referred to.]

Mr. *Walker*, Q.C. (of the Irish bar), and Mr. *Watkin Williams*, Q.C., for the Respondents:—

Treating this as a through contract, it does not follow that every part of it involves the same liability, and is subject to the same rules of construction. The contract is divisible: *Le Couteur* v. *The South Western Railway Company* (3). And that distinction was still farther enforced by *Zunz* v. *The South Eastern Railway Company* (4), which established that though a through contract might render a company liable so far as the journey went on its own line, it might not be applicable where the goods to be carried were delivered over to the charge of another company. And that was really only following out the previous decision in *Aldridge* v. *The Great Western Railway Company* (5), where a condition to that effect was held to exempt the company from liability.

Without entering into the question whether railway companies must be liable, at all events and under all circumstances, for losses occurring in steamers which were their own—which, considering the cases already cited, was very doubtful—there was good reason for saying that they could not be held liable for losses in steamers which did not belong to them, and which they were not by law authorized to build, or buy, or hire, or use, maintain, and work. So far as the conveyance by sea was concerned, the work was that of another and a distinct company, for the acts of which the Defendants were not to be made responsible. The steamer was the property of the *Dublin Steam Packet Company*, and was managed by the master, officers, and crew of that company, it was not under the control of the Defendants, or of their servants, and the Defendants had expressly, by general notice, and by the condition indorsed on the ticket, expressly declared that it would not be liable for what was done on the steamer, a steamer, in fact, over which the company had no control. And this notice was not to be treated as a surprise upon the Plaintiff, for he had often travelled in the same way before, and was well acquainted with the regulations of the company. He was, therefore, guarded with all the protections which the 31 & 32 Vict. c. 119, had intended to give to such persons, and was subject to the provisions of that statute, which enabled railway companies, by a notice of this kind, to exempt themselves from liability, and bound the person, acquainted with such a notice, in the same manner as if he had had a bill of lading containing the condition delivered to him. It was quite clear that in this respect the Legislature intended that the owner of goods sent by sea should be in fact subject to the operation of the laws relating to merchant shipping, and not merely to those applicable to railways alone. This was really established by the case of *The Normandy* (1), in which the South Western Railway Company was the party concerned. And even the 34 & 35 Vict. c. 78, in sect. 12, so much relied on by the other side, strengthened this argument, for that section assimilated railway companies employing steamers to railway companies which had steamers of their own, and were, therefore, altogether in the condition of persons carrying by sea. Now, as to shipowners, their liabilities were clearly defined, and wherever a railway effected the transit of animals or goods by sea, the rules of law applicable to shipping could alone be applied. The fact of booking through did not affect the question of liability. That was done merely for convenience in business, and was for the advantage of the Plaintiff, who would otherwise have had to make two or three payments instead of one, and would have found that these separate payments were not only more troublesome but more costly than the through-booking system. Such cases as *Peek* v. *The North Staffordshire Railway Company* (2) were not applicable to

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(1) 10 H. L. C. 473. 9 Jur NS 94
(2) 6th Ed. p. 593.
(3) Law Rep. 1 Q. B. 54. 12 Jur NS. 266
(4) Law Rep. 4 Q. B. 539.
(5) 15 C. B. (N.S.) 582; 33 L. J. (C.P.) 161.

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(1) Law Rep. 3 Adm. & Ecc. 152.

(2) 10 H. L. C. 473.

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the present. The circumstances were different, and the law relating to them was different. The right which the Defendants possessed at Common Law to protect themselves by conditions in contracts into which they entered had not been taken away by statute, or if affected by the enactment that such conditions must be just and reasonable, it was confidently submitted that these conditions were, with reference to the sea passage, and with relation to the facts of this case, entirely just and reasonable, and ought to have been allowed their full force.

Johnson v. *The Great Southern and Western Railway Company* (1), *Zunz* v. *The South Eastern Railway Company* (2), *McCance* v. *The London and North Western Railway Company* (3), were also referred to.]

July 27.

LORD BLACKBURN :—

My Lords, the Defendants below represent a railway company incorporated by Acts of Parliament in the ordinary way for making and carrying on a line of railway in *England*. In no one of its special Acts has it got what may for convenience be called steamboat powers.

The company, at an office which it has in *Dublin*, made a contract with the Plaintiff to carry sixty-three head of cattle for him from *Dublin* to *St. Ives*, in *Huntingdonshire*, for reward. To fulfil this contract it was necessary that the railway company should, in vessels belonging to it, carry, or should procure some shipowner in his vessels to carry, on its account, those cattle across the sea. It was immaterial to the Plaintiff which, provided the cattle were carried across. The railway company did procure the *City of Dublin Steam Packet Company* to carry the cattle in a steam vessel called the *St. Columba*. There was no privity of contract between the Plaintiff and the *City of Dublin Steam Packet Company*.

The jurors have found that the cattle were lost, not by any peril of the seas, but by the negligence of the crew of the *St. Columba*.

Had this been all, the railway company would plainly have been answerable to the Plaintiff for the damage sustained from not fulfilling the contract to carry the cattle to *St. Ives*, whether the liability was that of common carriers, or was not so extensive. But the contract was in writing and signed by the Plaintiff, and contained, amongst others, the following condition:—" Conditions of Carriage. The *Midland Railway Company* give public notice that they convey horses, oxen, sheep, calves, and pigs in waggons, and by cattle or merchandize trains, subject to the following conditions:—That with respect to any animals, luggage, parcels, goods, or other articles booked through by them or their agents for conveyance, partly by railway and partly by sea, or partly by canal and partly by sea, such animals, luggage, parcels, goods, or other articles, will only be so conveyed on the condition that the company shall be exempt from liability for any loss or damages which may arise during the carriage of such animals, luggage, parcels, goods, or other articles, by sea, from the act of Good, the Queen's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be accountable or responsible for loss of, or any damage or injury to, animals, goods, or property entrusted to them, arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the Queen's enemies, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master, or any of the officers or crews of the company's vessels."

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(1) Ir. Rep. 9 C. L. 108.
(2) Law Rep. 4 Q. B. 539.
(3) 7 H. & N. 477.

7 Jur NS - 1304

The phrase here used, of master and crew " of the company's vessel," must be construed as meaning master and crew of such vessel as the company shall employ, and cannot be restricted to the master and crew of a vessel owned by the company. If, therefore, this condition is valid, it protects the company from liability for the loss which happened.

The contention on behalf of the Plaintiff is, that the 12th section of the *Regulation of Railways Acts*, 1871 (34 & 35 Vict. c. 78), renders this condition void; the contention of the railway company is, that the enactment has not that effect. This is the one issue wrapped up in the voluminous pleadings.

But the construction of this section is not a simple matter. The scheme of legislation adopted in the Act of 1871 has been to incorporate that Act with several others which it partially alters, amongst others, with the *Regulation of Railways Act*, 1868 (31 & 32 Vict. c. 119), and the 31 & 32 Vict. c. 119, s. 16, adopts the language of the *Railways Clauses Act*, 1863 (26 & 27 Vict. c. 92, ss. 30, 31), without making all the alterations in the language which should have been made. And the 26 & 27 Vict. c. 92 again refers to and brings in the *Railway and Canal Traffic Act*, 1854 (17 & 18 Vict. c. 31), itself an obscurely penned statute, though its construction has been finally settled by the decision of this House in *Peek* v. *North Staffordshire Railway Company* (1), a decision made on the very day when the *Railways Clauses Act*, 1863, received the royal assent. My Lords, it would be strange if such legislation was not obscure.

The first matter to be inquired into is, what is the true construction of the *Railways Regulation Act*, 1868 (31 & 32 Vict. c. 119), s. 16, which applies the *Railway and Canal Traffic Act*, 1854, to the traffic carried on by railway companies on steam vessels which the railway companies themselves own or work.

The Court of Common Pleas in *Ireland*, in *Moore* v. *The Midland Railway Company* (2), and the Court of Exchequer and the Court of Appeal in *England*, in *Cohen* v. *The South Eastern Railway Company* (3), have unanimously held that the whole of the *Railway and Canal Traffic Act*, 1854, is extended to the whole of the traffic on such steamboats. The Judges of the Irish Court of Appeal have, by a decided majority, in the present case held that the passenger traffic on the steamboats was alone meant, and consequently that only the portion of the *Railway and Canal Traffic Act*, 1854, applicable to passengers is incorporated with the later statute, thus including sect. 7. I cannot agree with them.

I will now proceed to state to your Lordships what I consider the material parts of these Acts.

The *Railway and Canal Traffic Act*, 1854, applied to the whole

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(1) 10 H. L. C. 473. 9 Jur NS
914
(2) Ir. Rep. 9 C. L. 20.
(3) 2 Ex. Div. 253.

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traffic on railways and canals. The 7th section was so worded that there was a very unusual diversity of opinion amongst Judges as to what it meant. Finally, however, it was settled by the decision of this House in *Peek* v. *North Staffordshire Railway Company* (1), in conformity with the opinions of the majority of the noble and learned Lords who heard that case argued, that it meant, as the then Lord Chancellor (Lord *Westbury*) said (2), that "no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract, in writing, between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person."

But the *Railway and Canal Traffic Act*, 1854, applied only to traffic on the railway itself, and not to traffic when carried on by means of steamboats or other conveyances in connection with the railway. As it was *ultrà vires* in a railway company incorporated by Act of Parliament to own or work vessels, railway companies frequently applied to Parliament for powers to own and work steam vessels. I believe there is no instance of their asking for power to own or work sailing vessels, and I suppose, in practice, they never wish to own or work any but steam vessels in connection with their railway traffic. In the *Railways Clauses Act*, 1863, collecting in one Act the provisions usually inserted in Acts relating to railways, the 4th part relates to steam vessels, and begins with what, though printed as a part of the 30th section, is obviously a preamble to the whole of the sections in this part, that where a railway company is authorized by a special Act, incorporating this part of the Act, to own or work steam vessels for hire, then and in every such case. . . . Six sections followed, numbered in the Act, 30, 31, 32, 33, 34, and 35. The 30th section relates only to passenger traffic. The 31st section is in general terms, "the provisions of the *Railway and Canal Traffic Act*, 1859, so far as the same are applicable, shall extend to the steam vessels, and to the traffic carried on thereby." My Lords, it does not seem to me to admit of doubt that in a special Act, giving what may be called steam powers, and incorporating Part IV. of the *Railway Clauses Act*, 1863, this section 31 must be construed as meaning the whole traffic carried on by the steamboats and not merely the passenger traffic.

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(1) 10 H. L. C. 473. 9 Jur. N.S. 914

(2) Ibid. at p. 566. 9 Jur. N.S. 933.

In the *Regulation of Railways Act*, 1868, it was thought fit to extend these provisions to railway companies which had already obtained powers to work steamboats without being put under any restrictions, and also railway companies that should hereafter obtain such powers, without its being necessary to incorporate clauses 30 and 31 of the *Railways Clauses Act*, 1863, by reference.

Part of the preamble to the 4th part, relating to the incorporation of the clauses in a special Act, is struck out; the rest is, less happily, left in. Leaving out verbiage, sect. 16 begins thus: "Where a railway company is authorized to own or work steam vessels for hire, then, and in every such case," and then it repeats sects. 30 and 31, verbatim, but numbers them as one section.

I may here dispose of a point on which great reliance seems to have been placed by the pleaders and by some of the Judges below, though I think it was abandoned on the argument at your Lordships' Bar. The *Midland Railway Company* is not authorized by any Act of Parliament to own or work steamboats, and therefore, it is said, that this company, if owning and working steamboats, would be doing so illegally, and therefore would be free from the restrictions imposed, it is said, only on those railway companies legally owning and working steamers. It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the Act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway could not set up its own wrong, against a Plaintiff who contracted with the company in innocence and ignorance. *Doolan* and the *Midland Railway Company* are not *in pari delicto*. *Doolan* might perhaps set up against the *Midland Railway Company* that it was acting illegally, if it would in any way help him (which I do not think it in any way could), but it does not lie in the mouth of the railway company to set up its illegality, even if it would help it, which I do not think it would.

In *Cohen* v. *South Eastern Railway Company* (1) the Defendants were themselves the owners of the steam vessel; and they had powers under their Acts to hold steam vessels, and therefore this point did not arise. The question, however, whether the *Railway and Canal Traffic Act*, 1854, s. 7, was brought into the *Railway Regulation Act*, 1868, s. 16, was there raised; and the Judges of the Court of Appeal in *England*, after having their attention drawn to the opinions of those Irish Judges who, in the case now before your Lordships, thought it was not incorporated, expressed a unanimous and unhesitating opinion that it was. My Lords, it was perfectly open here to the counsel for the *Midland Railway* to argue that the opinion of those Irish Judges was right, and that of the Court of Appeal in *England* wrong. But I think that the decision in *Cohen* v. *The South Eastern Railway* (1) was right, and, without repeating the reasons given by Lord Justice *Mellish*, I refer to them as in my opinion jully justifying that judgment.

But in the present case the *Midland Railway Company* directors did not own or work the steam vessel. They were not, therefore, brought within the provisions of the *Railways Regulation Act*, 1868, s. 16. They did, however, under a contract for carrying animals, procure them to be carried in a steam vessel not belonging to the railway company, and the question mainly urged at your Lordships' Bar was, whether the *Railways Regulation Act*, 1871, s. 12, was or was not to be construed as extending the provisions of the *Railways Regulation Act*, 1868, s. 16, applicable to railway companies under a contract carrying goods by sea in their own steam vessels, to railway companies under a similar contract procuring them to be carried in steam vessels not belonging to the railway company.

In 1870 the steamer *Normandy*, belonging to the *London and South Western Railway Company*, was lost at sea with goods and passengers on board, which the *London and South Western Railway Company* had contracted to carry from *London* to *Guernsey*. Then commenced the litigation which was finally decided in *The London and South Western Railway Company* v.

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(1) 2 Ex. Div. 253.

James (1) in 1872, after the passing of the *Railways Regulation Act*, 1871. But the commencement of that litigation was enough to call the attention of the railway interest to this, that a shipowner carrying persons or property in his own ship had, by the Merchant Shipping Acts, in certain cases, his aggregate liability limited to an amount depending on the tonnage of the ship; but that a person, whether railway company or not, contracting to carry passengers by sea, and procuring a shipowner to carry them, had the amount which he could recover over against the shipowner limited, but was himself liable to his contractor for the full amount (unless he had stipulated that he should not be liable farther than he had recourse over), so that their liability was unlimited, their recourse over limited. This was not peculiar to railway companies. The railway interest sought to take advantage of the pendency of the *Railways Regulation Bill*, 1871, to introduce an enactment making their liability, when they were procuring other shipowners to carry for them, no greater than if they were carrying in their own ship; the burthen of proof that the misfortune happened whilst the goods were on the ship being in the company. This called attention to the fact that the existing *Railways Regulation Act*, 1868, left railway companies at liberty to impose any conditions when they procured other shipowners to carry for them. It was thought that the restriction on the liberty of contract already imposed on railway companies when carrying the traffic on their own steamers should be extended to such a case; and that if railway companies had contracted to carry partly by rail, partly by steam, and partly by coach or other conveyance on which they might by contract impose any condition, the burthen of proof that the misfortune happened after the goods had got out of the steamship ought to lie on the railway companies.

My Lords, in my opinion both objects were perfectly reasonable, and I think the Legislature intended to give effect to both; it ought, however, to have expressed its intention in two separate clauses, one for each object. And it is the unfortunate attempt to make one clause serve two purposes that has created the obscurity. Had the Legislature, using as nearly as may be the words actually used, said in one clause: Where a railway company under a contract for carrying *animals* or *goods* by sea, procures the same to be carried in a *steam* vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss or damage to animals or goods, in like manner as the railway company would be answerable if the steam vessel had belonged to the railway company (that is notwithstanding any condition, unless it was both embodied in a signed contract, and adjudged to be reasonable), provided that such loss or damage happens to the animals or goods during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company. And by a second clause enacted that: Where a railway company under a contract for carrying *persons*, animals, or goods by sea, procures them to be carried in any ship not belonging to the railway company, the railway company shall be answerable for loss of life or personal injury, or loss or damage to animals or goods, to no *greater* amount than if the ship had belonged to the railway company (that is to say, to an aggregate amount measured by the tonnage of the ship, according to the provisions of the *Merchant Shipping Act*). Provided that such loss happened during the carriage of the same in the ship, proof whereof shall lie upon the company. If that, I say, had been the wording of the enactments, all difficulty would, I think, have been removed.

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(1) Law Rep. 8 Ch. Ap. 241.

As the enactment is actually worded, there is, I think, some difficulty in finding apt words to limit the liability of the railway company for loss of life or injury to the person to the aggregate amount, though I cannot doubt that that was intended. That, however, is not the question before your Lordships.

I think there are quite sufficient words to express the intention of the Legislature, to extend the restriction on liberty of contract to contracts by railway companies to carry by sea, executed by procuring other steamship owners to do the sea carriage. Whether this be politic or not, the Legislature thought it politic. The proviso as to which so much has been said is applicable to this, and to this alone.

As to what seems to have weighed with some of the Judges below, that the railway company may contrive, by acting as booking agents for the *Dublin Steam Packet Company*, to evade the Act, I can only say that they are free to try. I doubt if it will

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be found practicable to have the benefit of an office of their own in *Dublin*, and, at the same time, to avoid the responsibility. If they succeed in doing so, and in a future *Railways Regulation Act* a clause is inserted to prevent it, I hope it may be more artistically framed.

The only remaining question is whether this clause is to be adjudged reasonable. The word "servants" in the *Railway and Canal Traffic Act*, 1854, sect. 7, I think, from the subject-matter of the Act, embraces not merely servants properly so called, but also the agents, whom, though not strictly servants, the companies employ to do for them what they have contracted to do. This was the construction put on the same word in an analogous enactment, the 8th section of the *Carriers Act:* see *Machu* v. *The London and South Western Railway Company* (1).

And as the condition now before your Lordships tries to exempt the company from all liability for the negligence of its officers and servants, if any condition can be unreasonable, this is. I therefore advise your Lordships to reverse the judgment, and allow the appeal with costs.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this case was argued very elaborately at your Lordships' Bar, and at the conclusion of the arguments I think no doubt existed in the mind of any of your Lordships as to the resolution at which we should arrive; but, in consequence of the very considerable complexity of the statutes which are involved, it was thought desirable that some interval should take place before your Lordships' opinion should be expressed.

My Lords, my noble and learned friend has gone, very carefully and with great detail, through the whole of the legislation on this subject, and has expressed a conclusion in which I entirely agree, and although I regret that your Lordships will find yourselves obliged to come to a judgment which differs from that of the majority of the Court in *Ireland*—for with the exception of the late Lord Chief Justice *Whiteside*, the Judges of the Court of Appeal in *Ireland* were unanimous—still I trust that, after the consideration which the case has received in this House, and after the great consideration which has been bestowed upon the similar cases which have arisen in this country, this question may now be considered as entirely settled.

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(1) 2 Exc. 415.

My Lords, I quite concur with the motion which my noble and learned friend has made.

LORD O'HAGAN:—

My Lords, I am of the same opinion. Your Lordships have reason to be obliged to my noble and learned friend who first addressed the House for the careful and lucid exposition he has given of all the statutes bearing on the case before us. It would be idle to repeat that exposition; and I shall follow the example of the Lord Chancellor by simply expressing my full concurrence in the result of it; whilst, from my sincere respect for the learned Judges whose views I cannot adopt, I shall formulate, in a few words, the particular conclusion at which I have arrived.

There are substantially two questions for the consideration of the House. A jury has found that the Plaintiff's loss resulted from the negligence of the crew of the vessel on which his cattle were embarked by the Defendants, to be carried from *Dublin* to *St Ives;* and the first question is, whether the 7th section of the *Railway and Canal Traffic Act* is incorporated by the 16th section of the 31 & 32 Vict. c. 119? The second question is, Whether sect. 12 of the *Railways Regulation Act*, 1871, is operative in the circumstances before your Lordships, and entitles the Plaintiff to compensation for his loss, although the Defendants were not the owners of the steamer in which, for hire, they undertook to transport his goods?

I do not recognise as arguable a third question with respect to the reasonableness of the conditions of carriage under which the Defendants seek to shelter themselves from liability. Some attempt was made to raise it, but plainly with little hope of success. The conditions are manifestly unreasonable; and the Defendants are answerable, if the sections to which I have referred are applicable to the case. I think they are both so applicable.

The words of the 16th section of the *Railways Regulation Act*, 1868, "The provisions of the *Railway and Canal Traffic Act*, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried thereby," appear to me sufficient to make those provisions effectively applicable to steam vessels in general and their traffic, whether in goods or in passengers. Reasonably understood, in connection with their antecedents, they are large enough for that purpose; they warrant the imposition of conditions and the acceptance of liabilities identical throughout the performance of a contract which ought to be, and is understood to be, one, and not split into portions; and I see no reason for being astute to limit their operation, which accords with sound policy and public convenience. They have been accepted, in the more comprehensive sense, by the Judges of the Common Pleas in *Ireland*, and all the Judges of the Exchequer and of the Court of Appeal in *England*. Only a minority of the Appellate Judges in *Ireland* have formed a different opinion, and that opinion was scarcely pressed upon your Lordships by the very able counsel who represented the Defendants here; and who, avowedly, sustained it from deference to the eminent persons by whom it was declared. Your Lordships may, in my judgment, safely reply to the first question in the affirmative.

As to the second question, looking to the course of legislation from the year 1854 until the year 1871, the policy developed by Parliament in its various stages, and the terms of the 12th section of the *Railways Regulation Act*, I think that it also must have an affirmative answer. The necessity for dealing with the great monopolies which have altered the whole character of our carrying trade by land and water, so as to guard individual rights, produced the successive statutes of 1854, 1868, and 1871. The first had application only to railways and canals; the second affected companies authorized to build, or buy, or work steam vessels for themselves; and the third was designed to affect them when they should procure the aid of other owners of vessels to carry goods which they had contracted to convey. One purpose runs through them all: to give security, in the new circumstances of society, to persons little able to protect themselves against masterful combinations, by creating restraints and responsibilities unknown to the Common Law which, in former times, was adequate for their protection; and those restraints and responsibilities were equally essential, whether the monopolists contracted to carry by land or by sea, in their own vessels or in vessels hired by them, in whole or in part, for the objects of their traffic. In all such cases the social necessity was the same, and the policy of Parliament was identical; and although the 12th section of the Act of 1871 is undoubtedly inartistic, obscure, and open to much verbal criticism, I think it sufficiently declares the liability of companies to be the same in transactions which are carried out by themselves, and in transactions in which they employ the instrumentality of others. No one can doubt the object of the section, and as the Defendants would have been liable, in spite of their extravagant conditions, if the vessel had been theirs, they seem to me to be no less liable within the fair meaning of the statute, because, for their own convenience, they thought proper to fulfil a part of the integral contract by putting the Plaintiff's cattle aboard a steamer which he did not choose, over which he had no control, and the use of which, in his circumstances, he had no power to reject.

I think that the appeal must be allowed, with costs.

LORD GORDON:—

My Lords, I quite concur in the opinion which has been expressed by my noble and learned friend on the opposite Bench (Lord *Blackburn*).

The case is decided under statutes which apply to the whole of the *United Kingdom*, and the case which we are at present considering is an Irish case. There have been no cases in *Scotland* which have raised directly this particular question, but in the only similar case of any importance which has come before the Scotch Courts, the case of *Finlay* v. *North British Railway Company*, the Scotch Courts quite recognised, as they were bound to do, the decision of your Lordships' House in the case of *Peek* v. *The North Staffordshire Railway Company* (1), and they also held that the justice and reasonableness of any conditions sought to be imposed by any railway company was a matter within the province of the Court alone, and that it might vary according to circumstances.

(1) 10 H. L. C. 473.

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I have no doubt whatever that your Lordships' judgment will prevent litigation with reference to any matter of the same kind in future.

Judgment of the Court of Exchequer Chamber in Ireland reversed; and Judgment of the Court of Common Pleas in Ireland restored, with costs.

Lords' Journals, 27th July, 1877.

Solicitors for Appellant: *Sherwood, Grubbe, Pritt, & Cameron.*
Solicitors for Respondents: *Carlisle & Ordell.*

[HOUSE OF LORDS.]

L. I.)
1877
June 15, 18;
July 30.

HUGH O'RORKE . . . . APPELLANT;

AND

JOHN JOSEPH BOLINGBROKE . . . . RESPONDENT.

Sale of Reversion—Undervalue—Infant—Professional Assistance.

15 Ch.D 683
685, 702

Mere inadequacy of price will entitle an expectant heir to apply to the Court of Equity to set aside (on terms) the sale of a reversion, and the *onus* of proving the transaction fair, and the price sufficient, is on the purchaser.

The repeal of the Usury Laws has not affected the jurisdiction of the Court of Chancery to give adequate protection, in such cases, to expectant heirs, or persons under pressure.

A settlement of an estate made on the marriage of *J. B.* and *M. L.* charged a sum of £300 a year as an annuity in favour of the intended wife for her life, and a sum of £3000 for portions for younger children. There were six younger children. *J. B.* got into money difficulties, and disposed of his own interests in the estate. The eldest son of *J. B.* became possessed (his father being still alive) of the estate itself, and sold it to *O'R.*, subject to the charges upon it for the wife's annuity, and the childrens' portions. Some of the children sold their expected portions to *O'R.*, and to another person, for varying sums of money. *J. B.*, the father, proposed to *O'R.* to purchase the portion of *John*, the youngest but one of the family. The father was then sixty-one years of age, and a stockbroker (who knew nothing of the state of *J. B's* health) valued the portion (£500) at £326. *O'R.* refused to give more. The negotiations for the sale lasted some weeks, the son all that time residing with the father at *Dover*. The son came of age on the 11th of April, 1870, went over to *Ireland* on the 18th of April, saw *O'R.* and his solicitor on the 20th of April, saw the deed on the 28th of April, was stated to have examined it, and expressed his approval of it (but that was denied), and executed it on the 30th of April, 1870. He never had a separate solicitor, or any one to act for him in the character of an independent adviser. The purchase-money was to be paid by yearly instalments. These were regularly paid till the end of 1874, and accepted by the son. At that time the son filed his bill to set aside the sale as fraudulent and void, and to have an account. The Master of the Rolls in *Ireland* had dismissed the bill; the Court of Appeal reversed that decision:—

Held, by LORDS BLACKBURN and GORDON, that, there being no evidence of fraud, the bill could not, under the circumstances, be sustained, and the decision of the Court of Appeal in *Ireland* was reversed.

Diss, LORD HATHERLEY, who was of opinion that though there was no evidence of fraud or misconduct on the part of the purchaser, still that the circumstances of the case brought it within the rule of Equity, that protection ought to be afforded to expectant heirs in cases of this kind, and that, as the young man here had not had the protection of a separate and independent adviser, the whole transaction must be opened.

THIS was an appeal against a decision of Lord Chancellor *Ball* and Lord Justice *Christian* in the Court of Chancery in *Ireland*, by which a previous decision of the Master of the Rolls there had been reversed.

The facts were these: On the 31st of July, 1830, a settlement was executed on the marriage of *John Bolingbroke*, of *Old Castle*, in the county of *Mayo*, and Miss *Sarah Lynch*, of the county of *Galway*, by which, after settlement of an annuity of £300 for the benefit of the lady, and other matters, there was a charge of £3000, expectant on the death of *John Bolingbroke*, created upon the settled estate for the benefit of the younger children of the marriage. There were six younger children, who therefore became entitled to a sum of £500 each, thus charged upon the estate. Mr. *Bolingbroke* fell into difficulties, and in 1866 his wife, Mrs. *Bolingbroke*, released her annuity of £300 a year, in consideration of being secured £200 a year for her separate use for life, her husband becoming entitled to the same annuity for his life, if he should survive her. Some of the children parted with their claims to the sum of £500 (part of the charge of £3000) expectant on the death of their father, in consideration of sums of money agreed upon as the purchase value of their individual shares. Miss *Lynch Bolingbroke*, the eldest of the younger children, and one of her brothers, *Charles Bolingbroke*, sold theirs to Colonel *Knox Gore* for the sum of £275 each. The father was said to have been concerned in negotiating these sales. In

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April, 1866, the eldest son, *Joseph Bolingbroke,* having acquired the fee simple of the estate, sold (in the Landed Estates Court) the *Old Castle* estate itself to the Appellant, it being then subject to his mother's annuity of £200 and to the charge of the £3000 for the younger children. In November, 1866, Miss *Sarah Bolingbroke* sold her £500 share of the charge to the Appellant for £250. Mrs. *Sarah Bolingbroke* (the mother) died in September, 1869, and the elder *Bolingbroke* (who then became entitled to his wife's annuity for his own life) and his daughter went to reside in *Dover,* having removed thither from *Boulogne.* By a deed of February, 1870, the father sold to the Appellant one-half of the annuity, amounting to £100 a year, for the sum of £710, the greater part of the consideration for which, consisted of moneys previously advanced to him, from time to time, by the Appellant. The sale of the Respondent's portion of the charge of £3000 was suggested to the Appellant by *John Bolingbroke,* the Respondent's father, and was conducted between them by letters. The negotiation began in July, 1869, and to the suggestion the Appellant answered that he had "no objection." The matter did not appear to have been again mentioned till the 4th of March, 1870, when Mr. *Bolingbroke* wrote: "My son *John* will attain his majority on the 11th of April, and wishes to dispose of his charge, to enable him to attend medical lectures; say what you are willing to give him for it." Mr. *O'Rorke* answered on the 7th of March: "Referring to your son's claim on the estate, you know what I paid for the last, also whatever increased value there may be in his claim." On the 31st of March *Bolingbroke* wrote: "His charge of £500 he is willing to part with for £400, to be paid to him yearly, half-yearly, or quarterly instalments, in whatever amount may be necessary for his support and payment of fees for attending medical lectures, say, about £75 a year, more or less." Mr. *O'Rorke* applied to a Mr. *Fox* (who was in fact a stockbroker, but whom he afterwards erroneously described as a notary), and received this answer from Mr. *Fox*: "The present cash value of £500 payable on the death of a life now aged 61 is £326 5*s.*" Mr. *O'Rorke* on the 4th of April sent this statement of value to Mr. *Bolingbroke* accompanied by Mr. *Fox's* indorsement thereon, made in these words: "Your own intelligence will suggest to you making better terms if you can." In a letter on the 6th of April *Bolingbroke* adhered to the sum of £400, observing that "as the payments quarterly embrace a period of five years you will not fail to see the policy of preventing the transfer of his charge to a third party." In the same letter he suggested to *O'Rorke* the making "an advance on my youngest son's charge." *O'Rorke* answered on the 8th of April: "I will not give one fraction more than that of the valuation, your son paying the attorney's costs, but in order to meet your views and your son's interest, I will advance him £75 or £80 per annum, giving him Bank rate of interest on whatever I may hold, until all is drawn." On the 9th of April *Bolingbroke* wrote: "My son agrees to your terms in every respect save costs, and desires, if you are satisfied to bear him scathless in respect to them, that you will have the deed prepared accordingly, and he will proceed to *Dublin* immediately after Easter and execute the deed. He desires me to add he will feel obliged by your kindly remitting him £10 in advance to cover travelling, &c.;" and there was then an application for an advance for an outfit for the youngest son. *O'Rorke* answered this letter by sending £10 for the Respondent, but wrote: "I think you should not have any hesitation about costs, as the arrangement is quite an accommodation, and besides allowing you interest, when I need not." On the 13th of April *Bolingbroke* wrote: "I received your letter and cheque for £10 for account of my son, for which we are greatly obliged," renewing at the same time his scheme for an advance for an outfit for the youngest son. During all the time of this correspondence *John Bolingbroke,* jun. (the Respondent), resided with his father at *Dover*. The deed for the sale of the charge was prepared by Mr. *McCully*, the solicitor for Mr. *O'Rorke*, who had acted as such in the previous matters. The Respondent became of age on the 11th of April, 1870. On the 18th of April he arrived in *Dublin*, and on the 20th of April had an interview with the Appellant and Mr. *McCully*, and gave them the name of the Rev. Mr. *Durcan* as that of the person who could send the baptismal certificate to shew the Respondent's age. Mr. *Durcan*, on being applied to, did send it. There was contradictory evidence as to whether Mr. *McCully* had suggested that the deed should be sent to another solicitor to examine it on the part of the Respondent. On the 28th of April, the deed being then prepared, the parties met again, and, as it was alleged on the part of the Appellant, but not admitted by the Respondent, the deed was read over to the Respondent, and examined and read by himself and approved. They met again on the 30th of April, and the deed was executed. The payments agreed upon were regularly made till the end of 1874, when the Respondent gave notice of his intention to open the whole transaction, and on the 11th of January, 1875, he filed his bill praying that the deed-poll might be declared to be fraudulent and void, and be ordered to be delivered up to be cancelled; and for accounts of what was due to him in respect of the said charge of £500, after allowing the Appellant all just credits, &c. An answer was put in, and affidavits filed, and witnesses examined. Some of these witnesses were medical men, who deposed to the bad condition of the health of the father in 1869 and 1870. It did not appear that the Appellant knew of this state of the father's health, and the father, when negotiating with the Appellant as to the purchase of another interest, had described his own health to be good.

The Master of the Rolls thought that no case had been made out for the bill, and ordered it to be dismissed with costs. On appeal, Lord Chancellor *Ball* and Lord Justice *Christian* reversed this order, and made an order in accordance with the prayer of the bill. This appeal was then brought.

Mr. *Jackson*, Q.C., and Mr. *Adair Phillips* (both of the Irish Bar), for the Appellant, insisted that everything had been done fairly, and that there was no ground whatever to invoke the interference of a Court of Equity, or to question the validity of the deed. The negotiations had commenced at the suggestion of the father, the natural guardian of the son; the son himself had taken part in the business; had seen the deed and come two days afterwards to execute it; and no deception had been practised on him by the Appellant. He knew of everything as it went on; he had had full opportunity of considering the sale; and, finally, he had from April, 1870, till the end of 1874 acted upon the deed and received the payments therein stipulated to be made. Value and undervalue, though important to be considered, were not the sole tests of the property of a sale even of a reversion, and where, as here, there was no pretence for raising the imputation of fraud, even undervalue itself would not be regarded: *Harrison* v. *Guest* (1); *Sugden's* Vendors and Purchasers (2). *Salter* v. *Bradshaw* (3) and *Foster* v. *Roberts* (4) did not apply here, if indeed the rule stated in the latter of them (5), "that the burden of proof lies upon the purchaser of a reversionary interest to establish that he has given the full and complete value for it," can be sustained. In the former the Master of the Rolls relied much on the fact that at the time of the sale no pains had been taken to ascertain the real value of the thing purchased. Here that was done, and the value fairly stated, and opportunity for consideration offered, and the terms agreed to after time taken for consideration. In *Aylesford* v. *Morris* (6) fraud was much relied on; no application was there made to the father. Here the father was the first proposer of the purchase, and the negotiator of the transaction. The son was residing with him all the time, and everything was done with his knowledge, if not actually through his agency: *King* v. *Hamlet* (7). There was no disguise, no concealment, no attempt to take advantage; on the contrary, everything was fairly done; the father proposed the sale, Mr. *O'Rorke* consented to purchase, fairly told what he was advised the portion was worth, agreed to give that and refused to give more; and was, after all that, requested to conclude the purchase, did so, and exactly performed all the conditions which had been deliberately agreed upon.

Mr. *Higgins*, Q.C., and Mr. *Monck* (of the Irish Bar), for the Respondent:—

The price paid here was really an undervalue. The life of the father was at the time a bad life, and in fact the reversion fell in from that cause within three months afterwards, so that inadequacy of price was manifest.

It is a settled rule of law that expectant heirs are to be protected in making sales of reversions. There was no such protection here. The father did not afford it. He obtained part of the money

(1) 8 H. L. C. 481.

(2) 14th Ed. c. 7, s. 1, par. 20.

(3) 26 Beav. 161. 5 Jur NS 831

(4) 29 Beav. 467. 7 Jur NS 400

(5) 29 Beav. at p. 471. 7 Jur NS 402

(6) Law Rep. 8 Ch. Ap. 484.

(7) 2 My. & K. 456; 3 Cl. & F. 218.

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which was in form, but in form only, advanced for the benefit of the son. The Appellant knew the circumstances of the father, knew how the father had parted, bit by bit, with all interest in the property, and must have known that the father was not the person to afford protection to the son, and it therefore became the Appellant's duty to warn the young man to take the advice of some person competent to give advice, and disinterested enough to give it fairly; and he had no right under such circumstances to continue the negotiation while the son was unprovided with professional aid. The rule as stated in *Evans* v. *Llewellyn* (1) was disregarded. That rule was, that such a transaction as this, even though there was no misrepresentation or actual fraud, could not be sustained, where the vendors of the property were in circumstances to require assistance and protection, but acted without any. That rule was emphatically approved of by Lord Justice *Turner*, in *Baker* v. *Monk* (2). This Respondent was not "competent to protect himself," and therefore he ought to have been protected. Actual fraud, in the ordinary application of the word "fraud" was not required. In such a case as this fraud means "an unconscientious use of the power arising out of the circumstances and conditions" of the parties (3). In the interest of expectant heirs selling reversions, the Court would imply fraud where there was undervalue. That had been done in *Salter* v. *Bradshaw* (4), and in *Foster* v. *Roberts* (5). The principle of the Courts of Equity to protect the weak and the unprotected was acted on in this House in *Smith* v. *Kay* (6), and it was there expressly said that that protection would not be confined to cases of a fiduciary nature. In the purchase of a reversion the purchaser must shew that he gave full value for it, and all the parties must conduct their dealings on equitable grounds: *Wood* v. *Abney* (7); *Longman* v. *Ledger* (8); *Clark* v. *Malpas* (9). In the last-named case, a purchase from a poor sick man, shortly before his death, at an undervalue, he being without due protection, was set aside at the instance of his heir-at-law. The same principle of the necessity of giving protection in cases of this sort was acted on in *Croft* v. *Graham* (1) and in *Miller* v. *Cook* (2), though in this latter case a solicitor had actually been employed when the transaction took place. *Tyler* v. *Yates* (3) was to the same effect, and these last-mentioned cases had expressly declared that the repeal of the usury laws had not in the least affected the jurisdiction of the Court of Chancery in such matters.

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(1) 1 Cox, 333; 2 Bro. C. C. 150.

(2) 4 De G. J. & S. 388, at p. 392.

(3) Per Lord *Selborne*, C., in *Aylesford* v. *Morris*, Law Rep. 8 Ch. Ap. at p. 491.

(4) 26 Beav. 161. 8 Jur NS 83

(5) 29 Beav. 467. 9 Jur NS 4

(6) 7 H. L. C. 750.

(7) 3 Madd. 417.

(8) 2 Giff. 166. 6 Jur NS 40

(9) 31 Beav. 80; 4 De G. F. & J. 401. 8 Jur NS 734

(2) SC 10 Jur NS 691-2,

It is not enough here to say that the father began the transaction, that he knew all the circumstances, and that he was the natural guardian and protector of the son, and that the son having the means of his protection could not now impeach what had been done with his sanction. This sort of argument was founded upon the observations of Lord Chancellor *Brougham* in *King* v. *Hamlet* (4). But in *Talbot* v. *Staniforth* (5) Vice-Chancellor *Wood* had commented on those observations as not being necessary for the decision of that case; and they were for another reason inapplicable here, for the circumstances of this case shewed beyond doubt that the father had not been acting as the adviser and protector of the son, and that, consequently, the son had been in a situation to require efficient advice and protection. Here, too, the solicitor of the Appellant had prepared the deed; it had never been seen by any independent adviser on the part of the Respondent, and the death of the father so early after the date of the purchase, shewed that the price given for the charge was a price wholly inadequate. Under all these circumstances the transaction could not be allowed to stand.

Mr. *Jackson* replied.

LORD HATHERLEY:—

My Lords, in consequence of my having the misfortune to differ in opinion from the rest of your Lordships with reference to what, in my view, should be the ultimate determination of this case, I have thought it necessary to enter, at rather greater length than

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(1) 2 De G. J. & S. 155.
(2) Law Rep. 10 Eq. 641.
(3) Law Rep. 6 Ch. Ap. 665.
(4) 2 My. & K. 456; 3 Cl. & F. 218.
(5) 1 J. & H. 502; 31 L. J. (Ch.) 197. 7 Jur. N.S. 961.

(1) S.C. 9 Jur. N.S. 1032.

I otherwise should have done, into those decisions and rules by which the Court of Chancery has been governed in regard to the dealings of persons whom the Court thinks to be in need of its special protection and care, with reference to interests which other persons may obtain in their property, without, as it appears to the Court, sufficient consideration or advice on the part of those who are in need of special protection.

My Lords, the Court of Chancery assumed jurisdiction, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations, when the Court was satisfied that they had not been adequately protected against the pressure put upon them by their poverty.

The early cases may be found collected in a note to *Davis* v. *The Duke of Marlborough* (1), in which note a full account is given of the case of *Berny* v. *Pitt* (2) before Lord *Nottingham*. A strong instance of the length to which the doctrine of inadequacy of protection was carried may be found in *Wiseman* v. *Beake* (3), where the Plaintiff, an expectant heir, was nearly forty years old, and was a proctor. There was at first considerable oscillation of opinion upon this jurisdiction, as is shewn by Lord Keeper *Guildford* having, in *Nott* v. *Hill* (4), reversed a decree of Lord *Nottingham*, which decree of reversal was itself reversed by Lord Chancellor *Jeffreys*. Lord *Guildford*, in giving judgment, says: "If it be to be decreed a law in Chancery that no man must deal with an heir in his father's lifetime, that were something." He was obviously dissatisfied with the doctrine; nevertheless the doctrine was established, and from that time it has been finally settled that mere inadequacy of price would entitle an expectant heir to set aside (on terms) the sale of a reversion; and farther, that the purchaser is bound to establish the fact that the transaction was fair and the consideration given was sufficient.

This doctrine at first was applied to all cases of expectancy on the death of parents, and was afterwards extended to the sale of any reversion, till a recent statute was passed declaring it not to be necessary for the purchaser to undertake the burden of proving the adequacy of price, where the transaction is otherwise fair.

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(1) 2 Sw. 108, 139, n.

(2) 2 Vern. 14.

(3) 2 Vern. 121.

(4) 1 Vern. 167.

But it was held in *Croft* v. *Graham* (1) that the repeal of the usury laws in no way affected the jurisdiction of the Court in reference to dealings with expectant heirs; and it has been held in like manner by Lord Chancellor *Selborne* and Lord Justice *Mellish* in *Lord Aylesford* v. *Morris* (2) that the Act with reference to the sale of reversions (31 Vict. c. 4) does not present any bar to the relief given in equity on sales by expectant heirs. I think both these decisions were correct.

It sufficiently appears that the principle on which Equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established, the Court extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of the "expectant heir," or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. *Evans* v. *Llewellyn* (3) (cited before your Lordships in the argument) is a strong instance of this. Lord *Kenyon*, then Master of the Rolls, set aside a contract, notwithstanding full explanation to the Plaintiff of his rights, which were, moreover, rights in possession, upon the ground of want of due protection. He says: "Here is a man destitute of money, and 200 guineas are suddenly offered him, which to a man in his circumstances is a very important sum, and he is then called upon to convey an estate in prejudice of himself and his family for the benefit of a person in affluent circumstances. It is said he was cautioned by Mr. *Medlock* (the Defendant's solicitor). It is true, and so far the parties did right, but they should not have permitted the man to have made the bargain without going to consult his friends."

The case of *Clark* v. *Malpas* (4), affirmed on appeal to the Lords Justices *Knight Bruce* and *Turner* (5), is another instance of the extension of the protection of the Court to a case of a man of full age and in possession, on the ground of surprise and inequality of position.

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(1) 2 De G. J. & S. 155.

(2) Law Rep. 8 Ch. Ap. 484.

(3) 1 Cox, 333; 2 Bro. C. C. 150.

(4) 31 Beav. 80.

8 June 1784

(5) 4 De G. F. & J. 401.

Now, what are the circumstances of the case before us? The Appellant, Mr. *O'Rorke,* had in 1866 become the purchaser of an estate in *Ireland,* which had originally been settled, on the ordinary trusts, upon the marriage of the Respondent's father and mother (the *Bolingbrokes*), and the Respondent was entitled, as one of the six younger children of the marriage, to a charge of £500, to be raised on the death of his father, whose original life estate had been conveyed to the eldest son subject to an annuity of £200 for the life of his father and mother, and the survivor of them, and to the portions of the Respondent and other younger children. The Appellant had become owner of the whole estate by means of a purchase made in the Landed Estates Court, subject to these charges.

The Appellant, being thus interested in the estate, entered into various transactions with *John Bolingbroke,* the father of the Respondent, for the purchase of a part of the annuity which formed nearly his whole source of support, and for the purchase of the portion of *Sarah,* one of the six younger children; and it cannot be doubted that at the date of the transactions impeached by the Respondent's bill in this suit, the Appellant was well aware of the great poverty of the father and of the family. But I think it right to say that I see no evidence whatever of a deliberate, fraudulent intent on the part of the Appellant to oppress and injure the father or the children, or to do anything more than to free the estate he had purchased from its remaining incumbrances, on the best terms he could make. *John Bolingbroke* (the father), as far as we can know from any evidence in the cause, was able to employ, and for all that we know, did employ, competent advisers; and, at all events, it does not appear to me that your Lordships should assume that any of the dealings between him and the Appellant referred to in the bill, which were not questioned in *John Bolingbroke's* lifetime, were unfair or open to attack. The only observation, then, that I make upon these transactions is, that the Appellant was certainly aware of the state of poverty to which the father and his family were reduced. In the dealings with the father for portions of his annuity, the Appellant appears to have given full value, on the footing of his life being a good life, and the father represented his own health to the Appellant to be sound and vigorous.

The Respondent attained his age of twenty-one on the 11th of April, 1870, and shortly before this, viz., on the 4th of March, 1870, the father wrote to the Appellant (with whom he was in correspondence about the sale of a portion of his annuity) a letter containing this passage: "My son *John* will attain his majority on the 11th of April, and wishes to dispose of his charge to enable him to attend medical lectures. Say what sum you are willing to give him for it." The Appellant, in answer to this letter, on the 7th of March writes thus: "Referring to your son's claim on the estate, you know what I paid for the last" (alluding to *Sarah's* portion of course) "also whatever *increased value* there may be in his claim," alluding, doubtless, to the age, and possibly, also, to the health of the father. On the 31st of March the father writes to the Appellant, asking £400 for the reversionary interest in £500, to be paid by instalments, so as to meet the son's requirements of £75 annually, for lectures and maintenance.

On the 2nd of April the Appellant writes to the father, saying, "The present cash value of £500, payable on the death of a life now aged sixty-one, is £326 5*s*." On the 4th of April he sends another letter enclosing the valuation by Mr. *Fox* (mistakenly said to be a notary) at the sum before-mentioned, and sends with it a memorandum by Mr. *Fox*, saying, "Your own intelligence will suggest to you making better terms if you can." On the 6th of April the father writes, adhering, as far as he can, to the original proposition, saying, "It did not require the notary's assurance to satisfy me, that in your proposition you did not seek an unfair advantage, or, as you plainly put it, to make a job of my son's claim; at the same time I am sure you must admit that the terms I mentioned were not only equitable but easily obtainable." The Appellant in reply on the 8th of April, 1870, states, that he "will not give one fraction more than that of the valuation, your son paying the attorney's costs;" but he offers to accommodate the father by paying the son an annual allowance of £75 or £80, and interest on the unpaid part of the valuation. In all this correspondence no direct allusion is made to the father's state of health, but it seems to be taken for granted that he was in a sound state of health, and it was upon that supposition, as I have already said (this is, no doubt, in favour of the Appellant), that the Appellant had been dealing with him in reference to the previous purchase of the interest in the annuity.

On the 9th of April the father writes, "My son agrees to your terms in every respect save costs, and desires, if you are satisfied to bear him scathless in respect of them, that you will have the deed prepared accordingly, and he will proceed to *Dublin* immediately after Easter to execute the deed. He desires me to add he will feel obliged by your kindly remitting him £10 in advance to cover travelling, &c." Your Lordships will observe that the father undertakes to make this agreement for his son on the 9th of April, just two days before his son had attained his age of twenty-one years. He then begins an inquiry as to a purchase of the portion of his youngest child, not then of age. On the 11th of April the Respondent had then attained his age, and the Appellant writes declining to be at a "penny costs," and suggesting that, as the matter is one of accommodation, "besides allowing you interest, which I need not," this should not be asked. I stop there to observe this, it presses very hardly upon the Appellant; at the same time one does note that he made an error in saying that he ought not to be fixed with the costs of the transaction on the ground of his allowance of interest, being a matter of favour and accommodation. Of course he was bound to allow interest upon the purchase-money which was due at once, although for the convenience of the parties it was paid by instalments. He was naturally bound to pay interest upon that, and he could not insist upon his having done so as a reason for not taking on himself the costs of the transaction.

The Respondent came of age on the 11th of April, 1870, and on the 18th went to *Dublin*. The Appellant had sent as requested £10 to the father, who gave his son £3, and retained the rest, possibly paying for the expense of the journey. The Respondent saw the Appellant on the 20th of April. In the course of conversation the Appellant inquired after the health of the Respondent's father, and the Respondent answered that "he was very unwell."

The Appellant says it was made as an ordinary complimentary inquiry, and he cannot recollect the exact answer; he does not deny the statement of it. I ought, perhaps, to observe that one of the learned Judges in one of the Courts below, the Master of the Rolls, who decided in favour of the Appellant and against the Respondent, says that *O'Rorke* was examined in his presence, and he thought from his statement that there was no reason to doubt his assertion that this statement appeared to him to be a casual inquiry, and had not made any great impression upon him. It appears that Mr. *McCully* (the Appellant's solicitor) prepared the deed by which the assignment of the Respondent's reversionary interest was carried into effect. The Appellant suggested the employment of a solicitor by the Respondent, and named a Mr. *McDermott* for that purpose, but the Respondent refused to employ him or any one else.

The deed prepared by Mr. *McCully* is certainly not such as would have been prepared or sanctioned by a legal adviser of the Respondent, but I do not look upon this as material to the case. I do not myself think that it was done with any special intent; on the contrary another solicitor was recommended, and that other solicitor not being to be had Mr. *McCully* took upon himself to act —it would have been better if he had not done so—but he did take upon himself to act, and acted in a manner somewhat more favourable to the Appellant than he should have done. The Respondent executed this deed and paid the £10 costs charged for it; not perhaps immoderate in amount. The material fact is, that the Respondent had no one to suggest to him the importance of ascertaining and considering his father's state of health.

At the first interview with the Respondent the Appellant advanced him £3, but refused to advance any more "until the transaction should be completed," thinking (as he says) that the Respondent ought not to require money after £10 had been sent to his father. In fact the Respondent must at this time have been without any money, having received only £3 from the £10 forwarded to his father. The deed was executed on the 30th of April, 1870, and payments were made under it down to the last instalment but one in 1874.

The above were the circumstances under which the transaction took place. On the 4th of July, 1870, less than three months after the conclusion of the matter, the Respondent's father died; and the consideration paid was far less than would have been the value had the state of health of the father been taken into consideration at the time of the sale of the Respondent's interest.

The state of the father's health is represented by the witnesses as follows:—*Sarah,* sister of the Respondent, says her father was very unwell when the Respondent went to *Ireland,* and continued to be in ill-health until his death. Dr. *Perrochaud,* a physician at *Boulogne,* attended *Bolingbroke,* the father, in the year 1868, and during his last year of residence at *Boulogne,* which was in 1869. He speaks of the father's intemperate habits, and consequent palpitation of the heart, and of his bursting a blood-vessel, after which time he considered his life a bad one. Mr. *Ottaway,* a medical practitioner at *Dover,* attended the father several times, commencing in November, 1869, then in May and June, 1870, and down to his death in July of that year. On each occasion he was found to be subject to derangement of health, "probably from drink;" he certified his death to be occasioned by syncope of the heart. *Adams,* a chemist at *Dover,* gives evidence to the same effect. He attended him also from time to time from about the period of this transaction up to his death.

I do not think that there is any evidence of the Appellant's being aware of this state of the father's health; on the contrary, he dealt with the father—when purchasing of him portions of his annuity—as being in good health, and the father had boasted to him of such being the case.

Upon the consideration of all the facts of the case, the Master of the Rolls in *Ireland* held that it fell within the principles laid down by Lord *Brougham* in *King* v. *Hamlet* (1), on which I had (when Vice-Chancellor) occasion to comment in *Talbot* v. *Stainforth* (2). I conceived the principle laid down by Lord *Brougham* to be that where the heir deals, not behind the back of his father, but with his sanction and assistance, and has all the protection which his father can give him, he is not entitled to relief as if the contract had been entered into without such parental protection. The case of *King* v. *Hamlet* (1) was a very remarkable one, and

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(1) 2 My. & K. 456; see 3 Cl. & F. 218.

(2) 1 J. & H. 484.

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I cannot concur with the Master of the Rolls in applying the doctrine above stated to the present case.

It is quite true that in the present case his father endeavoured to obtain as good a bargain as he could for the son, and I think we have no reason to suppose that the bargain was unfair in the sense of attributing to the Appellant knowledge of the state of the father's health. Nor do I see that the value given would have been inadequate had the father been in good health. But, as I have observed upon the authorities, the Court protects "expectant heirs," or those dealing for the sale of expectancies against "catching bargains," that is, against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest, and justly to estimate the proposals made to them: *Evans* v. *Llewellyn* (1), cited above, and *Clark* v. *Malpas* (2), are instances of this kind. As Lord *Kenyon* said in *Evans* v. *Llewellyn* (1), "I think that the young man should not have been allowed to act without independent advice." Any independent adviser consulted by him, would have asked, as his first question, 'What was the state of health of his father?'" The Appellant himself (if not interested) would have seen, when informed that the father was "very unwell," that such a fact materially affected the value of the annuity. The father was the last person to perceive what was, in this respect, his own position, and the importance of the inquiry to the son's interest. In dealing for the sale of his own annuity the father's interest lay the other way, and he would not wish to shew to *O'Rorke* that he had misrepresented his state of health. An independent adviser, had he known what the father's health was, would certainly have made better terms, if he had not probably suggested a loan in lieu of a sale of the young man's interest. The son was fettered by the bargain made by the father, in his name, before he was himself competent to contract; and I hold that the Appellant, being conscious of the youth's having only just attained his age of twenty-one, was bound to establish the fairness of the contract. Inadequacy of price is not alone sufficient to authorize the vacating of a contract for the sale of a reversion, but inadequacy of price coupled with the inexperience and absence of any competent advice on the part of the seller, are sufficient to set in motion the protective powers of the Court of Equity. The advice required was not even that of a professional man. Any man of business would have informed the Respondent of the elements of value on a sale dependent upon the expiration of a life, namely whether the life was of average value or not; and if no such friend could be found the contract should not have been entered into.

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(1) 1 Cox, 333; 2 Bro. C. C. 150.

(2) 31 Beav. 80. 8 Jur. N. S. 734

I think, therefore, that the exemption from the application of the general doctrine of the Court, which the circumstances of *King* v. *Hamlet* (1) furnish, cannot be extended to this case; though I cannot concur in the strong observations made by one of the Judges in the Court below on the conduct of the Appellant in respect of a series of transactions which have not been questioned in this or any other suit. I have, however, thought that this was not a case in which the contract could be maintained consistently with the doctrines of the Court of Equity. I feel a dread of invading those doctrines in the very slightest degree, and I feel strongly the extreme importance of maintaining the protection afforded to young men which they so greatly need in dealing, as this young man did, while utterly inexperienced, with their expectancies; and I cannot but come to the conclusion that Mr. *O'Rorke's* error has been this: He may well have supposed that the father, when the annuity was purchased, was in good health—he may possibly not have paid much attention, though probably, if he had not been a purchaser, he would have paid a little more attention, to the remark of the young man that his father was "very unwell;" but I think that he should not have permitted the young man, without the presence of some independent adviser to protect him, to enter into such a contract. If it is asked whether young men cannot enter into contracts for the sale of their expectancies under any circumstances, I say, Yes, they can enter into such contracts and engagements as the Court would enter into for them; that is to say, such contracts and engagements as may be for their benefit, being at the time aware of every circumstance which contributes to the full knowledge or estimate of the value of the property which is being dealt with. But I say, on the other hand, that those contracts cannot, with a due regard to the

(1) 2 My. & K. 456; see 3 Cl. & F. 218.

principles of the Court of Equity, be sustained where this knowledge did not exist. If this had been a case in which the young man was entitled to £500 now in the hands of the Court of Chancery subject to the life estate of his father, and if there had been the same dealings as here, and *O'Rorke* had upon the father's death petitioned to have that sum paid out of Court, I cannot conceive that that fund would have been paid out of Court, to the prejudice of the young man who had so parted with his interest in that property.

Before parting with the case, especially as your Lordships take a different view from mine upon the matter, I think I ought to say, and I do say, that I regret extremely the course which has been taken with regard to this young man's interests. I do not think that the suit could possibly in any way have been of any real benefit to him (I do not know to whose advantage the suit could have been) when you consider all the expense which must have been incurred; when you consider the mode in which the bill was framed, which dealt with this contract; when you consider all these charges of fraud which were introduced into it, most unjustly I think. For Mr. *O'Rorke* was simply pursuing a path in making the bargain which he thought he was entitled to pursue. It would no doubt have been better if he had exercised more discretion with reference to the position of the young man and with reference to the health of the father. At the same time it appears to me that there has not been a word established or proved in evidence of any misconduct on the part of Mr. *O'Rorke* with regard to the previous transactions, and I regret beyond all measure that one of the learned Judges in the Court below should have taken a different view, and should have made such observations upon the conduct and character of Mr. *O'Rorke*, that I can hardly see how it was possible for him (Mr. *O'Rorke*) to do that which I wish he had done, and which I think he ought to have done. It was scarcely possible for him, after such a bill had been filed, and after such a judgment had been delivered as was delivered in this case, to do otherwise than to fight it out to the utmost. It was impossible to do what I should much have wished to see done, namely, when it was made apparent to him, upon inquiry into the circumstances, that the father was in a state of hopeless ill-health at the time when the transaction took place, and could only have been expected to live three months longer, he should have said at once,—Let all parties be remitted to their former positions,—with such demands as he might have thought it reasonable or necessary to make in respect of any costs which he had been put to in the transaction. It is quite deplorable that for an estate of this small amount, some £120 or £130, there should have been all the expense which must have incurred, and all the vexation and annoyance which must have been occasioned in the course of these proceedings, beginning with the decision of the Master of the Rolls in *Ireland* and going on to the Court of Appeal in *Ireland*, and now coming up to your Lordships' House. I should add that I do not think that there have been any laches on the part of the Respondent in filing his bill, regard being had to the state of his poverty since the assignment was made.

My Lords, I believe the majority of your Lordships take a different view, but, having regard to the habitual protection afforded by the Court of Equity to the young and inexperienced, I cannot refuse to free the Respondent from his improvident bargain. Had I the advantage of your Lordships' concurrence in my view I should still express, and I now do so with the more emphasis, my great regret that such a litigation as this should have been pursued, regard being had to the amount in question between the parties; and I farther regret that such charges should have been made in the bill as necessitated resistance to the decree of the Court below. My own view would be to move your Lordships to affirm the decree of the Court of Appeal in *Ireland* and to dismiss this appeal; but as I am aware that a different view is taken by the majority of your Lordships, of course that will not be the result of this hearing.

I ought also to mention to your Lordships that in this case my noble and learned friend Lord *O'Hagan* (who from the effect of a slight accident is unable to attend) has intimated to me that he concurs in the view taken by the majority of your Lordships.

LORD BLACKBURN:—

My Lords, I have come to a different conclusion from that of the noble and learned Lord who presided at the argument of this case (Lord *Hatherley*), as I must advise your Lordships to reverse the decree of the Court of Appeal in *Ireland*, and restore the judgment of the Master of the Rolls.

The material facts and evidence are fully and accurately stated by the noble and learned Lord, and I need not state them again. But I think it is not quite accurate to say that the Master of the Rolls in *Ireland* based his judgment, at least to any material extent, on the principle laid down by Lord *Brougham* in *King* v. *Hamlet* (1). The Master of the Rolls, referring to another case, says (2): "Under these circumstances I have come to the conclusion that the bill is not sustained. The law as to the sale of reversionary interests, as it stands since the statute, is thus stated by Lord *Selborne* in *Aylesford* v. *Morris* (3): 'The arbitrary rule of equity as to sales of reversions was an impediment to fair and reasonable, as well as to unconscionable bargains; both have been abolished by the Legislature, but the abolition of the usury laws leaves the nature of the bargain capable of being a note of fraud in the estimation of this Court; and the Act as to sales of reversions (31 Vict. c. 4) is carefully limited to purchases made *bonâ fide*, and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. Those changes of the law have in no degree altered the *onus probandi* in those cases which, in the language of Lord *Hardwicke*, raise,—from the circumstances or conditions of the parties contracting, weakness on one side, usury on the other, or extortion or advantage taken of that weakness—a presumption of fraud. Fraud does not mean here deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions, and when the relative position of the parties is such as *primâ facie* to raise this presumption the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable.' I take that to be an accurate statement of the law as it stands at present. Fraud in this cause, in my opinion, there is none; nor is there unfair dealing, including in those words every dealing by which one man having the means of getting a better bargain from another, effects the transaction by these means. Undervalue I see none in proof. Standing alone, mere undervalue is worth little. The evidence before me has satisfied me, that this transaction, which originated from the father as guardian of his son, under circumstances calling for a disposition of this charge, was a contract carried out at arm's length between this young man and his father on the one side, and Mr. *O'Rorke* on the other. There was no inducement held out, no advantage taken, and the son has got the full benefit of the contract."

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(1) 2 My. & K. 456; see 3 Cl. & F. 218. (2) Printed papers in the case, 228.
(3) Law Rep. 8 Ch. Ap. 490.

I agree with the Master of the Rolls in thinking that the passage which he cites from the judgment in *Aylesford* v. *Morris* (1) contains an accurate statement of the law as it stands at present. In each case it must depend upon the circumstances whether the presumption which Lord *Hardwicke* spoke of, is raised. Sometimes there may be a serious question whether it is or is not. But in the present case, which is the purchase of a reversionary interest, from a lad, only a very few days above twenty-one, in furtherance of an arrangement made whilst he was yet an infant, I think that the burthen was thrown on the Appellant to prove that there was an absence of anything unconscientious on his part. I agree with the Master of the Rolls in thinking that the Appellant has fully satisfied this *onus.*

I could not come to that conclusion if I thought that any material part of the eloquent denunciations of the Appellant's conduct contained in the judgment of Lord Justice *Christian* was really based upon facts proved by evidence. The Lord Justice seems to have forgotten that it is of the essence of justice not to decide against any one on grounds which are not charged against him, and as to which he has not had an opportunity of offering explanations or calling evidence. I think it is only fair to Mr. *O'Rorke* to point out that those imputations of actual fraud are not made by the Lord Chancellor of *Ireland,* and are, I believe, in the opinion of every noble Lord who heard the argument, as well of myself, not justified.

But I think that the evidence does establish that in fact the father was at the time of this transaction in a state of health such

(1) Law Rep. 8 Ch. Ap. 490.

as to make the price given for this reversion (which would have been a fair and even a liberal one if his had been a good life) an inadequate price as the facts were.

I agree with the noble and learned Lord who presided over the argument (Lord *Hatherley*) that there is not any evidence of the Appellants being aware of the state of the father's health. On the contrary, he dealt with the father, when purchasing of him portions of his annuity, as being a good life, and the father had boasted to him of his good health. This is strong to prove that the Appellant *bonâ fide* believed the father's life to be good; and I see nothing to justify me in thinking that he did not reasonably believe this.

I think that if it had been known to the Appellant that the father was in bad health this transaction could not have stood. And I think that the same consequences would follow if it could be shewn that the Appellant was only ignorant of it because he had neglected to make proper inquiries, or had neglected to take some steps which, according to the rules of equity, he ought to have taken.

My Lords, I will first inquire whether, supposing the father's life had been a good one, and he had died at the time when he did, from railway accident or any other cause not connected with his state of health, could this transaction have been impeached? The father was in a state of poverty, and it would have been wrong to become a party to any proceeding which would have put the price of his son's reversion into his hands; but the proposal made by the father and carried out, was that the proceeds should be paid into his son's own hands for his own use.

To test the matter, suppose that the lad had been told that he must consult a competent adviser, and that he had come to one of your Lordships for advice, and told you that neither he nor his father had any money; that he had this reversionary interest in £500 but was otherwise destitute; and that it was proposed to sell his reversionary interest in order to apply the proceeds for the purpose of educating him. What would your Lordships' advice have been? Would you have said, You must on no account do so; you must labour with your hands for your livelihood during your father's life, in order that when your father dies you may be an uneducated man with £500 in your pocket? Such would not have been my advice. I should have told him that what was proposed by his father might turn out a blessing or a curse according to his own conduct, but that if he really would devote the period during which the proceeds would support him to study and acquiring knowledge of a profession, it was the best course for him. No doubt the lad would have sincerely enough declared his intention so to do. Had he then proceeded to ask if the terms offered by *O'Rorke* were fair, I should have said, They are more than you can hope to get from any one else, and, if your father's life is a good one, fair and even liberal, and I advise you to take them. I hope I should have been prudent enough to have added, But is your father's a good life; what is the state of his health? And I think the boy probably knew enough to have made an answer which would have led to the discovery that the life was not a good one.

I agree that if the Appellant was bound to insist that the lad should consult an independent adviser before acting on his father's advice, the Appellant can be no better off than if the lad had done so. And I agree that he ought to have required this if it was practicable. But it was the fact, and the Appellant knew it to be the fact, that the boy had no friend whom he could consult but his father. No doubt he might have consulted a professional man, if he could pay him. But it was the fact, and the Appellant knew it was the fact, that neither the boy nor his father had the means of paying a professional adviser. Was it then unconscientious in the Appellant to agree to an arrangement, sanctioned by the lad's natural guardian, and which was for the lad's advantage, and which (after making for his own sake inquiries as to the father's life when he bought the annuity), he not only *bonâ fide*, but on reasonable grounds, thought was fair, and even liberal, on his part. Or do the rules of equity require that no such purchase can be made under such circumstances, except at the peril of the purchaser, if the price thought to be fair and even liberal, should turn out, from a latent defect, to be inadequate? Before the late statute I think that was so; but I think it is so no longer, if the bargain be shewn to have been made *bonâ fide*, and without fraud or unfair dealing, which in this case I think it is.

It will be observed that I agree on the facts, and the inferences to be drawn from the facts, with the Master of the Rolls in *Ireland*, the Lord Chancellor of *Ireland*, and the noble and learned Lord who presided at the argument (Lord *Hatherley*).

I agree with the Master of the Rolls in *Ireland*, and I differ from the Lord Chancellor of *Ireland*, and the noble and learned Lord who presided at the argument (Lord *Hatherley*), as to the application of the rules of equity to the particular case. And it is a curious instance of how different minds draw different inferences, that the facts that the lad was penniless, and except for his father, friendless, which lead the noble and learned Lord to the conclusion that the bargain cannot stand, are the facts which lead me to the conclusion that there was nothing unconscientious in the bargain, because they made it impracticable for the lad to have that farther advice, which I agree, if practicable, the purchaser should have insisted on his having.

I therefore come to the conclusion that the appeal should be allowed, and the judgment reversed with costs.

LORD GORDON :—

My Lords, I have had the advantage of perusing and considering the opinions which your Lordships have just delivered. I entertain great deference for the opinion expressed by Lord *Hatherley*, who has had occasion, in deciding cases of a somewhat similar character, to define the rules which are applicable to such cases. But every case must be determined upon the special circumstances which are substantiated by the evidence laid before the Court; and I feel constrained in this case to adopt the view of the evidence which has been explained to your Lordships by my noble and learned friend (Lord *Blackburn*), and which was the foundation of the judgment of the Master of the Rolls in *Ireland*.

The sale of the right of reversion held by the Respondent was evidently a prudent transaction with reference to the interest of a young man who was then about to commence the study of medicine, which would occupy about five years. The health of his father had probably not entered materially into the valuation of the reversion, because his father had obviously lived in a somewhat irregular course; and an occasional illness might therefore be

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thought to be only the natural result of excess, and not seriously to affect his life. The father, with all his faults and frailties, was the natural guardian of the son; and provision was made for the price of the reversion being paid by annual instalments to secure the son's support and education while prosecuting his studies. There was nothing, therefore, which could give the character of fraud, so far as the father was concerned, to the transaction.

The only point, which creates hesitation in my mind, is that the son had not the benefit of legal advice in the transaction. It was not, however, one involving any complication; and in the absence of any reason for suspecting fraud, I do not think that circumstance alone would justify the overturning of the whole transaction, which was carried out fairly, and secured to the Respondent the sum which was fixed as the value of his right. Of course the want of legal advice in a case where there was reason for suspecting fraud would be a material element in the decision of such a case.

Even if I took a different view of the merits of the appeal I must express my regret that the Respondent's bill of complaint contained so many charges of fraud which have been unsupported by evidence.

I concur in the motion which has been proposed by Lord *Blackburn*, that the judgment complained of should be reversed with costs.

Decree of Court of Appeal in Ireland reversed, with direction that the costs paid by the Appellant to the Respondent in respect of that decree be repaid to the Appellant; and Respondent directed to pay to the Appellant the costs incurred by the Appellant in the Court of Appeal in Ireland and in this House.

Lords' Journals, 30th July, 1877.

Solicitors for Appellant: *Watney & Tilleard.*
Solicitors for Respondent: *Bischoff, Bompas, & Bischoff.*

[HOUSE OF LORDS.]

ORR EWING *et al.* . . . . APPELLANTS;

COLQUHOUN *et al.* . . . . RESPONDENTS.

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River Navigation above Tide—Not a Public Right.

Per LORD HATHERLEY:—There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way.

Per LORD BLACKBURN:—The public who have acquired by user the right to navigate on an inland water have no right of property.

Per LORD GORDON:—The right which the public have is a mere right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate.

Proprietor's Rights on both Sides.

Per LORD BLACKBURN:—The owner of the banks of a non-navigable river may without any illegality build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking the leave of the proprietors *above* him, provided he does not obstruct the water from flowing as freely as it was wont; and without asking the leave of those proprietors *below* him if he takes care to restore the water to its natural course before it enters their land.

Per LORD GORDON:—The right of a conterminous proprietor in the stream dividing his property from that of his opposite neighbour is very different from that with which your Lordships are now dealing.

Per LORD BLACKBURN:—I think it clear law in *England*, that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the Defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away. I advise your Lordships to hold that there is no such power in *Scotland*.

THE action in this case was commenced in January, 1876, by the trustees of the late Sir *James Colquhoun* of *Luss*, Baronet, praying a judicial declaration that the River *Leven* in *Dumbartonshire* "is a navigable river, free and open to the public; and that a bridge over it, which the Appellants were then erecting, would obstruct the navigation and the use of its banks and towing-path.

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The Appellants, Messrs. *Orr Ewing & Co.*, calico printers and *Turkey* red dyers, against whom the action was brought, are proprietors of land on both sides of the higher portion of the River *Leven*, where there is no ebb and flow. The bridge they were erecting was on their own territory, and they denied that it would obstruct the navigation.

On the 12th of June, 1876, the Lord Ordinary (1) pronounced the following interlocutor:

> Finds and declares that the River *Leven*, throughout its course from *Loch Lomond* until it falls into the river or *Firth of Clyde* at *Dumbarton*, is a navigable river, free and open to the public; and that the Defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the bank of the said river for the purposes of navigation, and decerns: Finds and declares that the piers recently erected by the Defenders in the bed of the said river near to the east bank are an obstruction to the free navigation thereof: Therefore decerns and ordains the Defenders forthwith to remove the said piers.

Against this interlocutor Messrs. *Orr Ewing & Co.* reclaimed to the Inner House (First Division), who, concurring with the Lord Ordinary, on the 26th of January, 1877, refused the reclaiming note (2).

Messrs. *Orr Ewing & Co.* thereupon appealed to the House of Lords, having for their counsel Mr. *Cotton*, Q.C., ~~and~~ Mr. *Davey*, Q.C., & Mr Alexander Young / *The Lord Advocate* and Mr. *John Pearson*, Q.C., appeared for the Respondents.

The argument on both sides involved a long and minute detail of facts and of evidence. All the circumstances are elucidated in the following opinions of the Law Peers. And the authorities cited and bearing on the case are fully examined and commented upon.

LORD HATHERLEY:—

My Lords, this case is one in which the Pursuers complain of the Defenders in respect of their having erected a bridge across the river *Leven*, at a part of that river where they (the Defenders) are proprietors on both sides. The Pursuers are the trustees of Sir *James Colquhoun*. The Defenders are gentlemen occupying a large manufactory and other works on one side of the river, and they are the proprietors of the land on both sides of the river.

(1) Lord *Rutherfurd Clark*. (2) Scotch Cases, 4th Series, vol. iv. p. 344.

Before erecting this bridge they entered into communication with divers persons who might be supposed to be interested in the matter, and, amongst others, with those concerned in the navigation of the stream. They entered also into correspondence with the author of the present Pursuers in respect of title, and from him they obtained a letter which has been a great deal referred to in the cause, but upon which I think the case will not be found to turn. He said in that letter that provided no injury were done to his fishings and other rights, he had no objection to the course they were about to take in erecting the bridge. The bridge was to be erected for the purpose of carrying a railroad over it, and the piers of the bridge were placed in the *alveus* of the river; and it is, or it was at first, alleged that they were so placed as to injure the rights of the Pursuers as to fishings, and their rights also in respect of the navigation of the river. The Defenders were said also to injure by these works the towing-path of the river, and in that sense also to injure the navigation. I think we may dismiss from our consideration that part of the case which referred to damage done to the fishing.

The Lord President, who first gave his judgment in the Court of Session, says:

> The only question is whether the piers of the bridge complained of interfere with the navigation of the river, and upon that ground ought to be removed.

And that, my Lords, is the point which, as it appears to me, it is now necessary for us to consider. The Lord Ordinary and three out of four of the learned Judges who sat in the Court of Session, when they inquired into this matter, were of opinion that injury was either done actually to the navigation of the river, or that such interference had taken place with the *alveus* of the river as that danger might possibly arise to the navigation of the river from the works which had been carried into effect. That is a question, as your Lordships will perceive, entirely of fact, and it will only be as such that we can treat it. Lord *Mure* was of opinion that that matter of fact was established in favour of the Defenders and not against them. When I say "established in favour of the Defenders," I apprehend that one may take it to be correct as a point of law with reference to these works, that the duty is cast upon the Defenders of shewing that when they have placed these works in the *alveus* they will not obstruct that right which is exercised by the public. At all events, I will assume that that burthen is thrown upon them, and will consider how far they have or have not discharged it.

My Lords, the River *Leven* appears to be a river upon which there is undoubtedly navigation, but not to any very great amount, in the course of the year. The navigation appears to be carried on in what are called scows, large barges, I suppose we should call them, the largest being of about fifteen feet beam, and the length being some fifty or sixty feet. This navigation has been going on for many years, and two of the witnesses called on behalf of the Defenders are persons who have been up and down with every scow or barge which has made the voyage past the place in question since the bridge was erected. The position of the bridge in the river is this: There are upon the River *Leven* several mills, and arrangements are made at those mills by means of what is called a mill-lade or mill-run for taking the water off from the river to the works which may require its assistance. That diversion is effected by means of a lade; and the water is guided into its course out of the river and down the lade by means of a weir which is erected for that purpose, of a solid construction sloping up into the river, and having what the witnesses called a batter or a slope down from its top into the *alveus* of the river. That is the mode in which these mill-lades are framed. One of these exists some forty or fifty feet below the bridge, so that anything passing through the bridge would within that short distance find itself abreast of, unless it went into, the mill-lade.

My Lords, that being so, we have further to consider what the navigable channel of the river is; and I think upon that it is established beyond a doubt that except in extraordinary circumstances, such as possibly I may have afterwards to refer to in connection with one piece of evidence, the navigable channel of the river is from a distance of twenty-five feet, as one of the witnesses for the Pursuers, Mr. *Copland*, the engineer, said, to the west of the eastermost pier, which is the particular pier complained of in the progress of this case as interfering with the navigation. Other witnesses, the witnesses for the Defenders, said that they put it at a rather greater distance than that; some said twenty-

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seven, others as much as thirty feet distant from the west pier. It is somewhere about that distance. As regards the depth it is said to be, even when it is not at its highest flow, some sixteen feet in that portion of the river I have referred to, which is a depth far greater than that occupied by any scow navigating the river.

It appears, on the other side, on the eastern side of the pier, which is the side where the lade is to be found, that, owing to some effect I suppose of scour, which may have been produced from the particular arrangements of the lade, or from whatever reason, there is in fact a hole. I can call it nothing else. Some of the witnesses for the Pursuers have spoken of that hole as being a portion of the river which they considered anterior to these works a navigable portion of the river. But my Lords, on the other hand, I think it will be found that the evidence largely preponderates to shew that barges were never in the habit of taking any other course than the course down the western side of the pier and in the deepest channel of the river; and that so far were they from taking any other course, especially towards the east of the pier, that the witnesses tell us that it was considered dangerous to pass by on that side, because if you passed at all near to that portion of the river which would be to the east of the pier, or which the pier itself occupies, you would run a great risk of being carried into the lade, a result which of course would be deprecated by those who were skilled in navigating the river.

My Lords, I shall now briefly refer to the evidence which makes out these points, before considering what would be the effect of the law applicable to the state of facts which I consider to be established by the evidence.

I consider the burden of proof to be thrown upon the Defenders; and I therefore look to their evidence to see how they have attempted to establish that proof. We first find a witness of considerable importance, one who I think is evidently quite impartial in the whole matter, Mr. *Alexander Neilson*. He describes himself as "Captain of the steamship *Chancellor*, belonging to the *Loch Lomond and Loch Long Steamboat Company*." He says:

> I run the *Chancellor* on *Loch Long* four and a half months of the year, and I remain in the service of the company during the winter time in connection with

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other work. I have been twelve years in the service of the company. I have been in charge of all the steamers that have been taken down the *Leven* during the last sixteen years. Before that, I owned gabbarts (1) on the *Leven* for about twenty years.

He is a man of very large experience, and he appears to me to be a very impartial witness. He goes on to say:

> I took them up and down very often, and am well acquainted with the navigation of the river. The greatest current I ever saw in the *Leven* was about six miles an hour. There are a great many catchwaters

—That is what is termed in our southern phrase weirs, the weirs or catchwaters are used to divert the water to the lades—

> and erections in the water at the various works along the banks. There are eight separate works down the river, and they all have catchwaters into the middle of the river, and some of them pipes to take off the water. The *Leven* is navigable on an average for about four months in the year. In September, 1875, I examined the new bridge at *Dillichip* (2) on behalf of the steamboat company, and reported my opinion upon it to the directors. I inspected it two or three times while it was being erected. I measured the bridge, and saw the height of the pillars. So far as they were concerned, I saw nothing to interrupt the navigation except that they were two feet too low. I thought that they should be raised to that extent, and reported so to the company. The bridge has since been heightened in conformity with that opinion. I consider that the navigation of the *Leven* at *Dillichip* is now as free as ever it was. I think there will be no more risk incurred than was incurred formerly in taking steamboats and scows down the *Leven* whatever be the state of the water. The deepest part of the channel [that I have spoken of] at the bridge where we used to take boats down was about twenty-seven or thirty feet west of the eastmost pillars.

Now, my Lords, I think I am justified in saying that as far as this evidence goes upon the matter of fact, it appears to me to be established plainly and distinctly that there is no interference with the right of navigation on this river.

The claim made by the Pursuers is to have an interdict, that is what in fact it amounts to, or a declaration of their rights. First they seek by their action to have it declared that the River *Leven* is "a navigable river free and open to the public," which it appears to me to be clearly made out that it is. It is open to public navigation in the sense of being open to free navigation on the part of those persons who may require the use of it. Then they seek further to have it declared that the erection of this bridge is an interference with that right. They seek further declarations with reference to their salmon-fishings which I have passed over, because that point was abandoned at your Lordships' Bar, and certainly does not seem to have been argued in the Court below. They seek also to have some declaration as to the towing-path, which seems likewise a point not insisted on for serious argument. But the point which has weighed most with the learned Judges in the Court below, and which of course your Lordships would feel to be one which would require very great consideration, having regard to the very high authority of those learned Judges who have considered the case, is, whether or not the Pursuers are entitled to a declaration with reference to the possible damage which may be done to the navigation of the river.

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(1) Scows.

(2) The bridge in question.

That which appears to have weighed most with the learned Judges in the Court of Session was the case of *Bickett* v. *Morris* (1), decided in your Lordships' House with reference to obstacles placed in the *alveus* of the river at *Kilmarnock*. That case itself was of a totally different character from the case raised here. That was a case of a proprietor on one side of the river having his rights interfered with by the proprietor on the other side making such an erection in the *alveus* of the river as to effect an alteration of the current of the stream with reference to his own land upon the other side. My Lords, I apprehend that the law applicable to that case would be beyond all possibility of doubt, neither should I have felt much hesitation anterior to that decision in coming to the conclusion that although each of the two proprietors on the banks of a river is said to have rights up to the *medium filum fluminis,* neither of those persons may so use those rights with reference to the river which has been accustomed for all time to run in a certain course as to alter the course of that river with reference to the property of his neighbour who is separated from him only by the river, and whose property on the other side of the river is affected by that change.

The learned Judges of the Court of Session seem to me to have applied the case of *Bickett* v. *Morris* in a manner in which the circumstances and the grievance complained of in this case would not permit it to be applied. They say, and it appears to me justly, that the right of navigation is a right to be protected like any other right, and you are not entitled to interfere with that navigation, because what you are now doing may be said not to interfere with any existing mode of navigation or with any existing mode of exercising that right. Now it appears to me that there are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way, and with that right of way you must not interfere in any manner by any course you take. The question seems to be simply this: Does this bridge interfere with that right of navigation as exercised, or as capable of being exercised, in the stream? A man having a right of way over my field cannot say that I shall not have the power to put swing gates across his path so as to inconvenience him in walking along it. I cannot put gates to shut up the path in such a way as would interfere with his exercising his right, but if I do not interfere with that, it cannot be said that I shall not put up gates. This point is dealt with in the opinion of one of your Lordships, which I have had the pleasure of seeing, and therefore I need not dwell upon it. I think we have evidence here which is beyond all dispute, evidence of people who speak with regard to the last half century with a perfect knowledge of the river, and they say that the right of navigation has not been exercised to the east of the piers of the bridge. In my opinion the case in your Lordships' House, which has weighed very much with the learned Judges in coming to the conclusion to which they have come, has no application to this case.

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(1) Law Rep. 1 H. L., Sc. 47.

Having come to the conclusion that no injury has been established of which these Pursuers have a right to complain, and having had the advantage of the assistance of one of your Lordships in considering the form in which the resolution of this House should be worded, it appears to me that we should do well to find that the River *Leven* is a navigable river, free and open to the public; that the Appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not, in point of fact, interfere with or obstruct the navigation of the river; and with these findings to remit the case back to the Court of Session, with instructions *quoad ultra* to assoilzie the Appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session.

Lord Blackburn (1):—

My Lords, in this case the Lord Ordinary (2), by his interlocutor, found that "the river *Leven* is a navigable river, free and open to the public, and that the Defenders have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the banks of the said river for the purpose of navigation," and "that the piers recently erected by the Defenders in the bed of the said river near to the east bank are an obstruction to the free navigation thereof, therefore decerns and ordains the Defenders forthwith to remove the said piers." On appeal to the First Division, the Lords, by a majority, adhered to the interlocutor.

The Pursuers, now Respondents, had in their summons and condescendence set up a case that there was an obstruction to the towing-path, and also that as proprietors of land on the banks of *Loch Lomond*, and as owners of the salmon fishery in the *Leven*, they sustained a damage, and had a cause of action special to themselves, beyond what any other of the public had. This was negatived by the Lord Ordinary, and no appeal having been brought by the Pursuers, now Respondents, it is, I apprehend, not competent to your Lordships to inquire whether this was right or not. The only appeal is by the Defenders from the interlocutors pronounced against them.

The River *Leven* is an inland stream, and the tide does not flow up to the spot where the piers are erected. And, as is pointed out by the Lord President, the rights of the Crown, as regards the soil of the *alveus*, and of the public to navigate, are not the same in such a river as they are in the sea or in a tidal estuary.

In the present case, however, there is ample evidence that there had been, at least as long as living memory extended, a user by the public of the navigation in the river, during the period of the

(1) Revised by his Lordship in print for the report.

(2) Lord *Rutherfurd Clark*.

year when the water was high enough; that is according to Mr. *Smollett*, who was called for the defence, on an average for two-thirds of the year. And the very able counsel who argued for the Appellants felt it so impossible to deny that there was evidence of user in this water-way by vessels, such that similar evidence if the question had been as to the user of a land-way by carriages would have established the public right, that he abandoned this point, and I do not think any of the noble and learned Lords who heard the argument entertain any doubt that the interlocutor, so far as it finds that the *Leven* is a navigable river free to the public, and that the Defenders have no right to execute works which obstruct the navigation, is right.

But the contest was as to the finding of the Lord Ordinary, that the piers recently erected by the Defenders in the bed of the river near to the east bank are an obstruction to the free navigation of the river, and the conclusion that the Defenders should be ordained to remove them. I have come to the conclusion that I ought to advise your Lordships to reverse the finding in the interlocutors on this.

The nature of the inquiry requires the consideration of two questions, each of mixed law and fact. First, What, just before the piers were erected, was the extent and nature of the public right, and over what space it extended? and when that is ascertained; second, Whether the piers are such and so situated as to be what in point of law is an obstruction?

I think that the facts are to a certain extent perfectly clear. The place in question is considerably above the highest spot to which the tide ever flows. There is there a curve of the river towards the east or left side of the river, so that the chord of the arc which the river forms is on the west side. The towing-path is, and has always, as long back as living memory goes, and certainly for more than sixty years, been on the west or right side. On the east side from some remote period before living memory, and certainly for at least sixty years, an artificial cut or lade to lead off water to the *Dillichip* works (now occupied by the Defenders), and a catch-water projecting up the river so as to divert the water into the lade have existed. This catch-water is between 300 and 400 feet in length.

The present condition of the catch-water is described by a witness called for the Defenders, *James Deas*, in the following terms:

That plan was made under my directions. It is an enlarged plan and sections of the river at and near *Dillichip Bridge.* The catch-water wall is from 8 to 10 feet broad at the base. It is a rough stone bank, with timber on the inside, and roughly pitched with stones on the outside. It is perpendicular in the inside, and slopes out with a batter to the outside. The water was a little under it the last time I saw it. On the first occasion it was covered. All that was visible was a little broken water on the top.

Cross.—I did not measure the perpendicular height of the intake wall, but it would be from 6 to 8 feet.

The Pursuer's witness, *Allan Stewart,* on cross-examination, referring to a cross-section made under his directions, says:

On cross-section 17, under the bridge, the deepest part of that is right in front of the lade. If a boat went down there before the bridge was built, I think it would be in very great danger of striking the catch-water wall. *Q.* Therefore that was not a part of the channel that could be used for navigation?—*A.* Certainly not exactly at the side of the bridge. It is hard to say how far the pitching of the catch-water wall is carried to the west, as there is very little of it visible, and I have no doubt that for safety it is carried underground for some distance. I should think the slope of the pitching would come out 2 or 3 feet towards the middle of the river. *Q.* Would that bring the edge of the pitching just about the westmost side of the east pier?—*A.* It takes 7 feet to bring the post at the catch-water to the westmost side of the pier. The post is on the east face of the wall. On the same cross-section the deepest part, under the main span of the bridge, is 50 feet from the west, and 40 feet from the east pier, and the depth is 2 feet 9 inches.

The cross-sections made by the surveyors on each side were all in process, but it has not been thought worth while to print them. They were, however, produced at your Lordships' Bar, and they correspond as to everything, except the extent to which the sloping side or bottom of the catch-water extends to the west.

The piers, it is clear, are in water as deep as any part of the channel, and the western side of the lowest of the two piers is about 41 feet from the solid bank as it now is, and about 6 or 7 feet further out than the post which marks the end of the inner wall of the catch-water, and consequently, if the sloping part extends so as to render the navigation impracticable for a distance of 10 feet, the pier is 3 feet to the east side of the impediment, if the sloping part so extends less than 7 feet, the pier projects on the west side of the impediment. All are agreed that the piers

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are about 30 feet higher up the river than the end of the catch-water where a post stands. Lord *Shand* says:

> The fact is that the east piers of the bridge have been put down in a part of this river which is deep enough for navigation purposes at many states of the river, and there can be no doubt that the piers would be an obstruction, and clearly a material and present injury to the navigation of the river, but for the circumstance of the existence of the catch-water, to which reference has already been made. The piers are about 5 feet in diameter, and are solid blocks of masonry, from 36 to 41 feet from the east bank; and there is no doubt they are in a depth of water that could be used for navigation. But then it is said, that though they would be an obstruction to a great part of the water-way if there was no catch-water there, they are not so in point of fact, because you must take the river as it has existed from time immemorial, and that is, I think, a reasonable contention on the part of the Defenders.

I do not think it possible to state the point as to which the difficulty arises more clearly than is here done.

If the piers had been placed 20 feet further west than they are it would have been too obvious to admit of argument that they must have been in point of fact and at the present time an obstruction to the navigation. If they had been placed 20 feet further east, so as, though in the bed of the river, to be quite inside the catch-water, it would, I think, be clear that they would not in fact have been at the present time an obstruction to the navigation, as it has been used as long as memory goes; but the question of law would have arisen whether they were illegal because placed in the *alveus* of the river, where if (by any possible, though improbable, change the catch-water was removed) the space might be useful for navigation. As it is, there is a disputed question of fact, which has to be determined on the evidence, viz., whether the navigation was *de facto* so used and enjoyed that the piers placed where they are occasion at the present time an obstruction to that navigation.

My Lords, there has been evidence given which renders this a question on which different minds may well come to different conclusions. And, in fact, the Lords of Session have come to different conclusions upon it. The Lord Ordinary did not apparently come to the conclusion of fact which he did without hesitation. He says:

> But the Defenders maintain that the piers do not obstruct the navigation. On this question the evidence is very contradictory. On the whole the Lord Ordi-

nary prefers that of the Pursuers. The witnesses for the Defenders give a very unintelligible account of the manner in which they have been accustomed to conduct their boats between the piers and the right bank of the river. One thing, besides, is very evident, that in descending the river a boat will have less space and time to clear the bridge than to clear the obstruction presented by the Defenders' catch-water dyke.

The Lord President says:

The Lord Ordinary's findings, I think, are quite satisfactory, in so far as he finds that this river is a navigable river free and open to the public, and that the Defenders have no right to execute any works which would in any way interfere with or obstruct the navigation or free use of its banks, and of the towing-path along the bank of the said river for the purposes of navigation; and I need only say, with reference to that last finding, that I should have been inclined to make it a little more extensive than his Lordship has done, because it seems to imply that in order to entitle the public to complain they must be in a position to shew that the operations of which they complain do in point of fact, and at the present time, interfere with or obstruct the navigation. I do not think the burden upon the Pursuers in an action of this kind is so heavy as his Lordship supposes. On the contrary, it rather appears to me that if any man building a bridge over such a river as this fixes his piers *in alveo* of the river, he is in point of fact committing what is an illegality in itself. He has no right to build in the *alveus* of the river. No man is entitled to build even in the *alveus* of a small stream, at least without the consent of all the other proprietors who are interested in that stream, and I think, *multo magis*, no man is entitled to build anything in the *alveus* of a stream in which the public have rights of navigation. In short, I am inclined to be of opinion that the doctrine which was applied in the case of *Bickett* v. *Morris* (1) is quite as applicable to a river of the description we are now dealing with as it was to a private stream. The principle of that case appears to be, that where there are other parties besides the party complained of who have an interest in a running water, it is illegal to build *in alveo*. It is not enough to say in defence of the operation complained of that it does nobody any harm. It may be that at the present moment the injury may not be foreseen, and yet it may occur, because nothing is so wilful and capricious (if we may use the expression) as a stream of running water, and it is almost impossible to foresee what the effect may be of any interference with the natural flow of such a stream as regards the proprietors further down the stream, or as regards the proprietor opposite to the place where the operation is carried out. Now, in like manner, in the case of a navigable river like this, where there is no great abundance of water, and where the deep part of the channel is but narrow, and there is nothing to spare in the way of room for navigation, it is very difficult to foresee what the effect of any operation of this kind may be in times of flood, or in various states of the river. The deep-water channel of a stream like this may shift and vary by the operation of causes with which we are very imperfectly acquainted, and which even experts of the highest skill are unable to foresee. And, therefore, to put down the pier of a bridge or any other building in the

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(1) Law Rep. 1 H. L., Sc. 47.

alveus of a river of this kind appears to me to be what I should call a dangerous operation as regards the navigation, even though it cannot be shewn that at the present moment it constitutes an absolute obstruction to that navigation.

I have made these observations because I have some little difficulty in saying that upon the evidence before us the preponderance or weight of the evidence is in favour of the Pursuers upon the question of fact whether the piers of this bridge do at the present moment moment constitute an obstruction to the navigation. It is a narrow case in that respect, and if the Pursuers were under the burden of proving as matter of fact that at the present moment there is an obstruction to the navigation caused by the existence of those piers, I should hesitate to affirm that proposition.

So that it appears that the Lord President would not have found the fact against the now Appellants if he had not taken a view of the law, which, if correct, rendered it immaterial.

Lord *Deas* says:

> The Crown holds the *solum* of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* of the river, and the right of navigation on the part of others requires use to found and support it. In the present case, therefore, I think it incumbent on the Pursuers to make out that the works objected to do or *may* cause obstruction to the kind of navigation which has been prescriptively practised by members of the public; but, on the whole, I think that the proof sufficiently preponderates in that direction. I do not intend to go into the details of the proof. In some respects it is contradictory, but upon the whole I think the burden of the proof is in favour of there being a certain degree of obstruction at present; and I think it is at all events impossible to say that there is no ground for apprehending obstruction in future. Either of these reasons is quite sufficient to entitle any member of the public, interested in the navigation, to object to such an erection as we have here, and consequently to justify the conclusion at which the Lord Ordinary has arrived.

So that he hesitatingly finds that there is a present obstruction, but, agreeing with the Lord President that it is enough if it is impossible to say that there is no ground for apprehending obstruction in future, bases his judgment more on that latter ground.

Lord *Mure* finds the fact for the Defenders.

Lord *Shand* finds, with some hesitation, that it is proved that in fact there is an obstruction, but with more positiveness bases his judgment on taking the same view of the case as is taken by the Lord President.

My Lords, before proceeding to consider what the fact is, I think it expedient to consider whether the law really is as the

Lord President and Lord *Shand*, and to a lesser degree Lord *Deas*, seems to have thought it was. I have very great respect indeed for the learning and logical acumen of those learned Judges, and I should not differ from them without much consideration. But I have come to the conclusion that they have taken a mistaken view of the principle on which the case of *Bickett* v. *Morris* (1) in your Lordships' House, and those Scotch cases which are there affirmed, were decided, or at least have applied it to a case to which what I think the true principle does not apply; I think and submit to your Lordships that the principle on which they were really decided was that where any unauthorized erection is a sensible injury to the proprietary rights of an individual, a/ there is *injurio*, for which he might in a Court of Law in *England*, recover at least nominal damages. A Court of Equity in *England*, or the Court of Session in *Scotland*, in the exercise of its equitable jurisdiction, would not order the removal of the erection if convinced that the damage was only nominal, but where there is an injury to the proprietary rights in running streams, the present injury now producing no damage may hereafter produce much. And I understand the principle of *Bickett* v *Morris* (1) to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. And I think the same principle will apply where the complaining party is not a proprietor, *ex adverso*, of the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection *in alveo* alters the natural flow of the water on the complaining parties' land. But I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se*, if all who have property on the banks of the stream consent to the erection. Nor do I think it was meant to be decided, nor do I think it law, that a riparian proprietor on the water of *Kilmarnock* or on the

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(1) Law Rep. 1 H. L., Sc. 47.

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water of *Irvine*, into which it flows, 10 miles below the town, on whose land the flow of the water would be in no way affected, could have maintained the action against *Bickett* for altering the line of his building in the town on the water side, which *Morris*, the proprietor of the houses and building ground immediately opposite, did maintain; for I think that there would be no injury to the proprietary right of the party complaining in respect of such land, no *injuria* to him.

Now the public who have acquired by user a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shewn that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria*, and I think that if there be no *injuria*, the foundation of the right to have the thing removed, fails.

My Lords, as the *ratio decidendi* of this House in *Bickett* v. *Morris* (1) is unquestionably binding, I shall proceed to support my view of that decision by argument and authority, and I think it the more necessary to do so, as the Lord President, who as Lord Justice Clerk was a party to that decision, seems now to take a different view of the effect of that decision from that which I take.

My Lords, where the property in the banks of a natural stream, above the flow of the tide, is in different persons, *primâ facie*, and until the contrary is shewn, the boundary between their properties is the *medium filum aquæ*. In this respect there is no difference between the law of *England* and *Scotland*. And, after some diversity of opinions, it has, I think, been for many years the settled law of *England*, that the proprietor of land on the bank of such a river has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the water. This can hardly be considered as settled law in *England* before the case of *Mason* v. *Hill* (2), in 1833. It had been the

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(1) Law Rep. 1 H. L., Sc. 47.

(2) 5 B. & Ad. 1.

law in *Scotland* from a much earlier period. In *Bannatyne* v. *Cranston* (1):

> It was not found necessary to the Pursuer to libel or qualify any use of the burn and water thereof wherein he was prejudiced by the Defenders taking in the same, seeing the Lords found that the water running by his land which lay marching contiguous to one side thereof, could not be drawn from any part of the land marching thereto without his own consent. For albeit, he had no present use thereof, yet he might possibly find thereafter some use for the same.

This was in the year 1625. Precisely the same law has been now established in *America*, *Blanchard* v. *Miller* (2), and in *England*, *Mason* v. *Hill* (3), without, I think, either the American or English Judges being aware that the Scotch Judges had so long before anticipated their reasoning. This right is subject to the use of the water by those above him, below him, and opposite to him, either acquired by user, or such as the general law gives to the riparian proprietors. I refer to the very elaborate judgment of the Court of Exchequer delivered by Baron *Parke* (in 1851), in the case of *Embery* v. *Owen* (4), as containing an exposition of the English law.

In *Miner* v. *Gilmour* (5) (in 1858), Lord *Kingsdown*, in delivering the judgment of the Privy Council, says:

> It did not appear that for the purpose of this case any material distinction exists between the French and the English law. By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it, or what may be deemed the extraordinary use of it, *provided that he does not thereby interfere with the rights of other proprietors either above or below him.* Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

My Lords, I do not know if the Lord President, in the passage I have already read, means to state that the law of *Scotland* is that an erection *in alveo* of a running stream, though in a man's own land, is *primâ facie* illegal, even if it does not alter the flow of the water on any one else's land, nor interfere with the rights of other proprietors either above or below him, nor with the public right of navigation in another part of the stream. But I think that it was necessary to go as far as this in order to support his conclusion. If such be the law of *Scotland* it is different from what Lord *Kingsdown,* in the passage quoted, states to be the law of *England* and *France.*

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(1) Mor. Dict. 12,769, "Property."
(2) 8 Greenleaf, Amer. Rep. 268.
(3) 5 B. & Ad. 1.
(4) 6 Ex. 367.
(5) 12 Moore, P. C. 156.

I have already read what the Lord President says on this subject, and I cannot agree to it.

The owner of the banks of a non-navigable river has an interest in having the water above him flow down to him, and in having the water below him flow away from him as it has been wont to do: yet I apprehend that a proprietor may without any illegality build a mill-dam across the stream within his own property and divert the water into a mill-lade without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont; and without asking the leave of the proprietors below him if he takes care to restore the water to its natural course before it enters their land. It would require strong authorities to lead me to believe that the law of *Scotland* does give the proprietors on the banks of the stream a right to act the part of the dog in the manger to such an extent as to hinder this. None were cited at the bar, and I find that in the *Magistrates of Linlithgow* v. *Elphinstone* (1) it is laid down that,

> A man who builds a mill is entitled to make an aqueduct, provided, after using the water for his mill, he restores it to the river from whence it was taken. This right he has from the law of nature without the aid of prescription.

The Lord Advocate admitted that he understood the law of *Scotland* to be that if the same person is proprietor of the ground on both sides of a river, in which there is no right of navigation, he can change its channel as he pleases, provided he restores it to its old channel before it leaves his ground. That is, of course subject to this qualification, that it flows out of his ground into the lands below as it was wont to flow, neither increased nor diminished in quantity or quality or direction.

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(1) Kame's Dec. 332.

There have been several Scotch cases in which a proprietor on one side of a river had been held entitled to have a new erection *in alveo* removed, but in every one of them the person complaining of the erection was one who owned land against which the new erection directed a flow of water greater than had been wont to flow on it before. In *Menzies* v. *Lord Breadalbane* (1), Lord ~~Eldon~~ Lyndhurst seems to me to point out with great clearness that it was against such a proprietor who is prejudiced, and as I think against such a proprietor alone, that the erection was unlawful. He first points out that it was clear in fact that if the embankment should be continued as it was projected "it will have the effect of throwing the ordinary flood streams of the river off the lands of Lord *Breadalbane* and on the lands of Sir *Neil Menzies*," and then says (2):

> Now with reference to the law of *Scotland* this is perfectly clear, that a superior heritor cannot direct (query divert?) any part of a stream to the *prejudice* of an inferior heritor. It is also clear that an inferior heritor cannot do that which shall cause the water to stagnate to the *prejudice* of the superior; that is acknowledged to be clear law. But it is said, that applies only to the *alveus* of the course. But it does not appear to me that there is any solid ground for this distinction. The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel. I am not talking of that which it takes in extraordinary or accidental floods; but the ordinary course of the river in the different seasons of the year must, I apprehend, be subject to the same principle.

He concludes that Lord *Breadalbane* in this case ought not to be allowed to carry on this work in what (if I may be allowed to coin a word to express Lord ~~Eldon's~~ Lyndhurst idea) was the flood *alveus* of the river to the prejudice of Sir *Neil Menzies*, but that the interdict as craved was too extensive, and he would prepare a judgment with the proper qualification. That deliberately prepared judgment is as follows:

> That the Respondent ought to be prohibited and interdicted from the further erection of any bulwarks, or any other *opus manufactum*, upon the banks of the *Tay*, which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of the Appellant.

I cannot think that Lord ~~Eldon~~ Lyndhurst would have given a similar udgment against works of Lord *Breadalbane*, in the accustomed course, either in times of flood, or in summer, in favour of a proprietor whose lands lay on the *Tay* below *Dunkeld*, and on whose lands the diverted waters could not be thrown.

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(1) 3 Wilson & Shaw, 235; 3 Bligh N.S. 414

(2) Ibid. p. 243.

It remains to see if there is anything in the judgment in *Bickett* v. *Morris* (1), and above all in the opinions of the noble and learned Lords who advised your Lordships' House on that occasion, inconsistent with this view of the law. I think there is not.

There certainly was nothing in the facts of that case to call for a judgment inconsistent with it. The Pursuer and Defender were proprietors of the opposite sides of the *Kilmarnock* water where it flows through the town of *Kilmarnock*, where the land is building land, and every foot is or may be of value. The Defender had built, and after warning persisted in building, his wall into the course of the stream, and thereby necessarily diverted the water and threw it on the Pursuer's land. The point made was, that this could not be held to the prejudice of the Pursuer, unless he could shew that damage had actually been occasioned. As to this, the Lord Justice Clerk (now the Lord President), says (2):

> I entertain no doubt that a party in the position of the Defender here is not entitled to make any erection *in alveo*; but then, at the same time, if it could be shewn that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—*in emulationem vicini*—not under any apprehension of danger to himself or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line, if it could be shewn that the work had been accidentally extended into the *alveus*, I am not prepared to hold that such a work would be illegal.

My Lords, I pause here to observe, that on the view of the facts in the present case which I take, and which I understand the Lord President also to take, this is an apt enough description of the present case. He then goes on:

> But, then, the question comes to be whether the Pursuer in this case, though he cannot (and that is the fair result of the proof) shew that any damage has actually been occasioned by the erection of this wall, is not in a position to say that an injury has been done to him because the operation involves a certain risk of damage. . . . There is nothing the operation and action of which is more uncertain than running water. . . . I think, therefore, looking to the nature of the subject, and to the fact that this is not an encroachment of an inch or two, or any such impalpable encroachment as that, but that it is an encroachment clearly established to be of considerable size, and certainly calculated to effect some

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(1) Law Rep. 1 H. L., Sc. 47. (2) 2 Court of Sess. Cas. (3rd Series), 1089.

deviation in the course of the water, that the opposite proprietor, the Pursuer, is well entitled to say, "I apprehend risk to my interest, I apprehend that my property may be affected by the consequence of this diversion of the stream."

And the interlocutor appealed against was as follows:—Find that the erection complained of by the Pursuer is an erection in the *alveus* of the waters of *Kilmarnock ex adverso* of the Pursuer's property, and has the effect of diverting to a certain extent the flow of the water, and is *therefore* an illegal encroachment on the rights of the Pursuer. A conclusion of law which, if the facts were as stated above, I think irresistible. It then proceeds to order the removal of the erection, the propriety of which would depend on the various considerations stated by the Lord Justice Clerk in the passage I have just read.

On appeal, Lord *Chelmsford*, the Lord Chancellor, says (1):

> It is in respect of their property in the land that the Pursuers dispute the right of the Defendant to encroach on the river.

And afterwards (2),

> The proprietors upon the opposite banks of the river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the medium *filum fluminis* neither is entitled to use the *alveus* in such a manner to interfere with the natural flow of the water. . . . It seems to me clear that neither proprietor can have any right to abridge the width of the stream or to interfere with its regular course; but anything done *in alveo* which produces no sensible effect upon the stream is allowable. It was asked in argument whether a proprietor on the banks of a river might not build a boat-house upon it? Undoubtedly that would be a perfectly fair use of his rights, provided he did not thereby obstruct the river or divert its course, but if the erection produced this effect, the answer would be that essential as it might be to his full enjoyment of the river, it could not be permitted.

(That is, as I think, implied by Lord *Chelmsford*, though not expressly said, if the proprietors of that part of the river where the course is impeded or diverted object.) He goes on:

> *A fortiori*, when the act done is the advancing of solid buildings into the stream, not in any way for the use of it, but merely for the enlargement of the riparian proprietor's premises, which must be an infringement upon the right and interest of the proprietor on the opposite bank. . . . Any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being *primâ facie* an encroachment, the *onus* seems properly to be cast upon the party doing it to shew that it is not an injurious obstruction.

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(1) Law Rep. 1 H. L., Sc. 53.

(2) Ibid. p. 55.

H. L. (Sc.)
1877
ORR EWING
v.
COLQUHOUN.

Which I again think must by implication mean an obstruction injurious to the opposite riparian proprietor, with whose rights it is an interference.

Lord *Westbury* had, in the course of the argument, said:

> If I build a boat-house, though it injures no one, it would seem that any riparian proprietor may complain.(1)

He seems to have (in my opinion very justly) thought that if the Pursuer's argument went so far as this it could not be sound. But on consideration he found that it did not go so far. And he says:

> I am convinced that the proposition, as it has been laid down in the Court below, and as it has received the sanction of your Lordships' judgments, is one that is founded in good sense, and ought to be established as matter of law(2)

In my view of the case, what was laid down in the Court below and received the sanction of this House was, that the Pursuer and Defender being owners of opposite properties on the *Kilmarnock* water, each therefore was, there being nothing to shew the contrary, proprietor of the *alveus* up to the *medium filum aquæ*, and each had, as incident to his property, the right to insist that the regular flow of the water should continue on his side as it was wont to flow, which in ordinary times would be a benefit; and that nothing should be done to obstruct the regular flow of the water on the other side of the stream, so as to cast more water on his side than had been wont to flow, which at least in times of flood would be a burthen. The Defender had, without any right, built an encroachment on his side of the river, which necessarily caused more water to flow on the Pursuer's side, and though that encroachment was small, it was such as in a small stream to make a sensible alteration in the flow. That was an injury to the proprietary right of the Pursuer, but he was not able to qualify present damage. The decision of the Court of Session was that this was an injury to the proprietary rights of the Pursuer, whether he could qualify damage or not, and that he was entitled to insist on the erection being removed, it being from the nature of the property (building land), and the nature of the right infringed, highly probable that there would be damage. All that was said as to the impossibility of telling what a stream, if running, would or might do was in my opinion relevant only to the question

(1) LR 1 HL Sc. 51. (2) LR 1 HL Sc 61

whether there was such an absence of damage as to lead the Court, in the exercise of its equitable jurisdiction, to refuse to interfere and order its removal.

It was said in argument in the present case that whether the stream was navigable or not made no difference as to the rights of the riparian proprietors; and that in *England* at least it made no difference whether the tide flowed or not. I agree to this, but on the question whether an erection in the *alveus* of the stream is of sufficient magnitude to cause a sensible alteration of the flow of the water, I think (though it is unnecessary for this case to consider how that may be) that the magnitude of the stream may be of great importance. The river *Amazon* is many miles wide, and (assuming the law of *Brazil* to be the same as that of this country) I think that a proprietor of land on the one bank of a stream of that width would not be in a position to require one on the opposite shore to remove an encroachment of one or two feet into the river, for it would do him no sensible injury, though in the narrow *Kilmarnock* water such an encroachment did do the opposite proprietor sensible injury, which, especially seeing it was in a town, and was or might be building land, was very likely to produce substantial damage, though he might not as yet be able to shew present damage.

In the case of *Attorney-General* v. *Lord Lonsdale* (1) the obstruction was in a tidal river, but it occupied one-third of the bed of the river. In *Attorney-General* v. *Terry* (2) there was an actual occupation by the piles put in by the Defendant of part of what was used for the navigation and wanted for the navigation. The Master of the Rolls intimated an opinion that the Court of Equity might order the piles to be removed, though doing no present damage to the navigation, if they might be a damage hereafter, I apprehend on the ground of the piles being placed on the soil of the Crown, and therefore a wrong to the Crown. How that may be in such a case it is unnecessary to consider. I think it clear law in England, that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the Defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away. And with every respect for the judgment of the learned Lords of Session from whom I differ, I advise your Lordships to hold that there is no such power in *Scotland.*

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(1) Law Rep. 7 Eq. 377.

(2) Law Rep. 9 Ch. 423.

My Lords, on the question of fact I would not lightly come to a different conclusion from the Court below if they had been unanimous, or even if the Lord Ordinary who saw the witnesses and their demeanour, had formed a strong opinion on the result of the evidence. But, as appears from the passages I have read, in the present case the finding in fact comes before your Lordships without any such prestige. And, as it seems to me on such a question as this, the evidence of the surveyors and engineers is of very great weight as to the condition and depth of the river and the position and size of the piers, but in my mind of very little weight as to the mode in which the navigation, by vessels floating down the stream without any locomotive power, was used. No one of them pretends to have any practical knowledge of such navigation, and it is too exceptional a kind of navigation to have become part of the general knowledge of an engineer.

Of the practical men who were called on both sides, *Dugald Macfarlane* (called for the Pursuer) says distinctly:

> If we go to the west side of the east piers of the bridge we keep clear of the intake and catch-water. If we steered straight from the piers we would certainly go on the catch-water.

John Russell says:

> That the piers are just where our proper channel was, where we went up and down.

And *Neil Black* says nearly the same thing, but the cross-sections made on behalf of both parties shew that the preferable part of the channel at all events was west of the piers, so that I think these witnesses prove too much. I think the other witnesses for the Pursuer are all persons conversant with the towing of boats up the stream, not with the manner in which boats were conducted down the stream. On the other hand, *George Macfarlane* and *John Stewart,* who have had the conduct of every boat that went down since the bridge was built, and certainly are persons of much experience, are positive that in taking boats down they never went nearer the intake than fifteen or twenty feet to the west of it, so as to clear the catch-water; their evidence if believed shews that the spot where the piers now stand was avoided by those who managed the boats.

The Lord Ordinary seems to have distrusted their evidence because he thinks the account they give of the manner in which they have been accustomed to conduct their boats unintelligible; I presume, referring to their statement, that loaded boats have steerage way and answer the helm, and also, as they phrase it, steer themselves, or keep the channel, whilst light boats require to be poled. All agree that such is the fact, and if I were bound to find a theoretical reason for it I should infer that in such a stream as the *Leven* the upper and the lower strata of water do not flow with a uniform velocity, and that there may be something in the nature of an undertow off the banks. But I am not inclined to reject the evidence of practical men as to a fact, merely because they give a bad theoretical reason for it, and I am not able myself to furnish the right one. I have been told that some years ago the pilots in the English channel uniformly asserted that there was a current setting towards the French shore, and to allow for that supposed current they always steered to the north of the course which by the chart and compass they should have held. It was ascertained that there was no such current, and some ships were lost because their commanders disregarded the rule of the pilots, because their reason for it was wrong. On further investigation it was found that the deflexion of an unadjusted compass from the action of the iron in most ships was such as make it right, when the ship's head lay either east or west, to steer to the north of the course by chart as indicated by that compass. The pilots were quite right in the fact which they had observed, though quite wrong in their reason. Whether what I have been told is accurate or not, it is a good illustration of what I mean.

I think, therefore, that the balance of evidence is in favour of the piers being out of the channel where a right of way had been acquired by user, and I think that the Court, before ordering the Defenders to incur the heavy expense of pulling down a bridge erected in the *bonâ fide* belief that it was no obstruction, ought to be satisfied affirmatively that it is an obstruction.

There is one point more which I should mention. Something done out of a highway altogether may be a public nuisance, if it renders the use of the highway less safe; for example, if an excavation is made for the purpose of erecting a new house close to a public highway, and left unfenced, so that persons using the way might, if accidentally deviating a little from the way, fall into it, it is a nuisance: *Barnes* v. *Ward*. (1) But there the neglect of duty is not in making the pit, but in leaving it unfenced. A Court of Equity in such a case would not order the Defendant to fill up the excavation, if he put up sufficient fencing to make it safe. Lord *Shand* points out that a vessel accidentally deviating from its intended course would now strike a dangerous obstacle, which formerly was not there. Perhaps as things are, the Defenders would be responsible for the consequences of an accident of this sort if it happened; but the conclusion, if such a nuisance was proved, would be, not that they must remove the pier, but that they should put up a fender of the kind suggested by Mr. *Copland* in his evidence. This, however, was not asked for by the Pursuers.

I come, therefore, to the conclusion that the appeal should be allowed with costs. I agree that the judgment should be as moved by my noble and learned friend who has preceded me, according to the suggestion of my noble and learned friend opposite, Lord *Gordon*.

My noble and learned friend Lord *O'Hagan*, who heard the argument, but is disabled by a slight accident from attending your Lordships' House and voting on this occasion, requests me to say that he has perused this opinion and concurs in it.

LORD GORDON (2):—

My Lords, the Appellants are proprietors of large manufacturing works at *Dillichip*, on the east bank of the River *Leven*, which flows from *Loch Lomond* and falls into the *Clyde* at *Dumbarton.* A line of railway from *Balloch* on *Loch Lomond* to *Dumbarton* runs along the west side of the *Leven*, and the Appellants desired to connect their works with that railway. To enable them to do so they acquired from Mr. *Smollett* of *Bonhill* a piece of ground on the west bank of the river on which to construct the necessary connecting branch and a bridge across the river. Before commencing their operations they caused intimation of the nature of their intended works to be made to the persons who might be supposed to be interested in the navigation of the *Leven* and of *Loch Lomond*, and amongst others to Mr. *Smollett* and the Duke of *Montrose*, the two largest proprietors on *Loch Lomond.* Intimation was likewise made to the *Loch Lomond Steamboat Company*, who were also materially interested. But, after consideration, no objection was made by any of these parties to the proposal. The steamboat company, during the course of the operations, did indeed suggest that the height of the bridge should be increased, and their suggestion was complied with. The Appellants also caused intimation of their contemplated works to be made to Sir *James Colquhoun* of *Luss*, the author of the Respondents. This intimation was made through Mr. *Wylie*, the factor for Sir *James*, who, on the 14th of May, 1872, wrote to Mr. *Young*, the Appellants' engineer, that he had been directed by Sir *James* to state that he "will make no objection, provided his fishing and other rights are not interfered with." I think that the rights here referred to were only the patrimonial rights of Sir *James Colquhoun* in the estates belonging to him, and that, beyond these, he had not in contemplation the reservation of any rights he might have as a mere member of the public. I think this is confirmed by the letter which the agents of the Respondents wrote to the Appellants on the 3rd of November, 1875, being the first complaint made by the Respondents in regard to the bridge, in which they refer to the injury their client's patrimonial rights would sustain by the erection of the bridge; and also by the fact that the note of suspension and interdict subsequently raised by the Respondents was not based on alleged injury to public rights. But in the view which I take of the merits of the case, it is unnecessary to advert more particularly to the argument which has been submitted to the House in regard to this point.

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(1) 9 Com. B. 420.

(2) Revised by his Lordship in print for the report.

The building of the bridge now in question was commenced in March, 1875, and the east piers had been erected in the *alveus* of the river and completed by September, and the whole frame of the bridge is said to have been completed by the end of the year. The Respondents on the 31st of December, 1875, presented a note of suspension and interdict against the Appellants to have them interdicted from erecting the bridge, which had by that time been erected; and on the 26th of January thereafter the Respondents raised the present process of declarator, in which they for the first time allege injury to public rights. But while doing so they set forth the injury done to their patrimonial rights as the main ground they have for seeking the removal of the bridge. They say, in the fourth article of their condescendence, that the erection of the pillars will obstruct the passage of salmon up and down the river; and in the fifth article they state:

> The most *material interest* which the Pursuers have in the matter is the effect the bridge, as it is being constructed, will have on the value or return from the estate under their charge. The erection of the bridge will materially interfere with the transmission of the produce from the farms, and of goods to them. These articles will not be transmitted as conveniently and cheaply as hitherto, but will have to be carried by road or rail, and the value of the lands will be diminished, and the rents to be obtained lessened. The Pursuers have been informed and believe that the impediments which the bridge will cause in the conveyance of wood from the Pursuers' lands down the *Leven* will prevent merchants from giving the same price for it as formerly. As a considerable quantity of wood from the estates is likely to be in the market in a few years amounting in value to several thousand pounds, any reduction of price will be a serious loss to the trust estate.

The Respondents also allege that

> The erection of the pillars for the bridge on the towing-path will interfere with the towing of vessels, inasmuch as the horses will not be worked with the same freedom as formerly; and the erection of the pillars for the bridge in the bed of the river will obstruct the passage of vessels, or at least of the scows or gabbarts up and down the river.

These are the allegations of damage on which the summons is based; and on these the Respondents seek to have it found and declared

> That the River *Leven* throughout its course from *Loch Lomond* until it falls into the River or Firth of *Clyde* at *Dumbarton* is a navigable river, free and open to

the public; that the Defenders (Appellants) have no right to execute any works which will in any way interfere with or obstruct the navigation thereof, or the free use of its banks and of the towing-path along the bank of the said river for the purposes of navigation; and that the Defenders (Appellants) have no right to erect any bridges, piers, or other works therewith connected, which will in any way injuriously affect the rights and interests of the Pursuers (Respondents) as proprietors of salmon fishings in the said River *Leven* and in *Loch Lomond.*

And then the summons concludes to have it found and declared that the works complained of do, and will, obstruct the free navigation of the river, and use of the towing-path, to the injury of the Respondents, and will also injuriously affect their salmon fishings, and should therefore be removed.

The proof has not supported the Respondents' allegations of injury to patrimonial rights and to the towing-path; indeed the proof is in direct opposition to the allegations. Accordingly the Respondents do not now contend that the patrimonial rights which, in their summons, they alleged were materially affected, have, in point of fact, been so affected, and, therefore, it is unnecessary further to advert to these. And it is also unnecessary to advert to their allegation of injury to the navigation by the alteration of the towing-path, as that is also now admittedly out of the case. The only point now really at issue in the case is the finding of the Lord Ordinary, which has been adhered to by the Court, that the piers recently erected by the Appellants in the bed of the river near to the east bank are an obstruction to the free navigation of the river; and that in consequence they should be removed.

The Appellants did not at your Lordships' House dispute that the *Leven* is a navigable river free and open to the public. But the river is capable of very limited navigation, the only vessels which use it being the few scows or gabbarts referred to on the record, and occasionally, when the river is in flood, the *Loch Lomond* steamboats on their way to and from *Dumbarton* for repairs. The fact that the *Leven* is a navigable river, free and open to the public, infers that the Appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along its bank for the purpose of navigation. I think it appears that there are several other bridges having piers on the *Leven.*

The *Leven* during the greater part of its course is a fresh-water stream, and is so at the point where the bridge in question has been erected. The *alveus* of such fresh-water rivers belongs to the proprietors of the properties along their banks. Where such a river is navigable, free and open to the public, the right which the public has in such a river is substantially a mere right to use the river for the purposes of navigation similar to the right the public may have to passage along a public road or footpath through a private estate. In the case of *Galbraith* v. *Armour* (1) in this House, Lord *Campbell* said:

> I must express my clear opinion that, by the law of *Scotland*, as well as by the law of *England*, the soil of the public highways is presumed to be in the conterminous proprietors; and that if a public highway is established by usage over the land of another, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established.

And Lord *Brougham* stated that he entirely agreed in the views stated by Lord *Campbell.* But though the public has no right of property in such rivers or roads, they have a right to object to any obstruction being placed in the river or road which interferes with or obstructs the use of them to which they are entitled.

But I do not agree with the finding in the Lord Ordinary's interlocutor that the piers recently erected by the Appellants in the bed of the river, near to the east bank, are an obstruction to the free navigation thereof. This is a finding of fact which depends on the evidence. I do not mean to refer particularly to that evidence, because it has been fully adverted to by Lord *Blackburn.* But I have carefully considered it, and I agree in the view of it which your Lordship on the woolsack and his Lordship has taken, and I think it is of importance to keep in view that the Judges in the Court of Session were divided in opinion in regard to it. I concur in the opinion of Lord *Mure,* who goes fully into the facts of the case, that it has not been proved that the piers in the bed of the river do *de facto* obstruct the navigation of the river.

It is contended by the Respondents that it is not necessary for them to establish by evidence that the piers in the bed of the river do at present obstruct the navigation, and that it is sufficient if it is shewn that the erection may, at some future time, and under some change of circumstances, cause such an obstruction. The majority of the Judges in the Inner House of the Court of Session in this case have adopted this view, and they found strongly on the case of *Bickett* v. *Morris.* (1) But that was a case between two conterminous proprietors having property on the opposite sides of a small stream flowing through the town of *Kilmarnock,* and each having a right of property *ad medium filum* of the stream; while as regards the stream itself there was a common interest which entitled each to object to any operation which might interfere with the regular flow of the water. This is very clearly and fully brought out in the opinions of the Judges of the Court of Session in the report of the case on the 20th of May, 1864. (2)

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(1) 4 Bell's Appeals, 374, 11th July, 1845.

The case of *Bickett* v. *Morris* (1) appears to be quite in accordance with the law laid down in this House in the prior case of *Menzies* v. *Lord Breadalbane* (July 4th, 1828) (3), the rubric of which is:

> Held (varying the judgment of the Court of Session) that an heritor was not entitled to erect a bulwark, or any other *opus manufactum,* on the banks of the River *Tay* which might have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood.

It was contended there that the bulwark, if allowed to be finished, must have the necessary effect of turning the great body of water, which formerly went down upon the south side of the channel, towards the north, upon the complainer's (Sir *Neil Menzies*') property, and thus overflowing the lands upon that side in a much greater decree than formerly. The House ordered and adjudged:

> That the Respondent ought to be prohibited and interdicted from the further erection of any bulwark or any other *opus manufactum* upon the banks of the River *Tay,* which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the lands of the Appellant.

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(1) Law Rep. 1 H. L., Sc. 47.

(2) 2 Court of Sess. Cas. (3rd Series), 1082.

(3) 3 Wilson & Shaw, 235.

Lord *Eldon*, in comparing the law of *England* and *Scotland*, said:

> This case must be decided by the law of *Scotland*. Now, with reference to the law of *Scotland*, this is perfectly clear, that a superior heritor cannot divert any part of a stream to the prejudice of an inferior heritor. It is also clear that an inferior heritor cannot do that which shall cause the water to stagnate to the prejudice of the superior; that is acknowledged to be clear law.

The cases of *Bickett* v. *Morris* (1) and *Menzies* v. *Breadalbane* (2), as well as the cases of *Farquharson* v. *Farquharson*, 1741 (3), and *Magistrates of Aberdeen* v. *Menzies*, 1748 (4), which were also referred to as authorities for having the piers complained of in the present case removed, were all cases between adjoining or *ex adverso* proprietors. There was no question of navigation involved in any of these cases, neither was there any case of public right. The right of a conterminous proprietor in a stream dividing his property from that of his opposite neighbour is, in my opinion, very different from that with which your Lordships are now dealing. The Lord President seems to think that there is no difference in principle between the private rights of conterminous proprietors and those of the public. He says:

> I do not understand that the case of Sir *James Colquhoun's* trustees is really based upon the notion that they have a private right here, as distinguished from that of any other member of the public. But it appears to me that the distinction is one of no consequence in the application of the legal principle. The proprietor on the banks of a stream has an interest to prevent an erection in the *alveus*, because it may interfere with his rights—it may interfere with the flow of the stream, and so injure him. But it is not because he is a proprietor on the banks of the stream, but because, being a proprietor on the banks of the stream, he has an interest in the water, that he has a title to complain, and it is because the public have a right in this water that they, I think, have a title to complain. The title is not so much that of proprietorship as of interest in a running water, and in that respect the title of the complainers here, and the title of the complainer in *Bickett* v. *Morris* (1) are identical in principle.

With great respect for his Lordship's opinion, I cannot agree with his Lordship in the view that there is no difference in principle between the rights of conterminous proprietors, and the right of the public. I think that the interests which adjoining proprietors have in a stream are numerous, both in the water itself and in regard to the benefits or injuries which it may cause to their properties, and that these interests give them a right to complain and seek the removal of any impediments to the flow of the river.

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(1) Law Rep. 1 H. L., Sc. 47.
(2) 3 Wilson & Shaw 235.
(3) Morrison, Dict. 12779.
(4) Ibid. 12787.

But, in my opinion, the interests of the public in such a case as your Lordships are considering are very different from those of conterminous proprietors. The rights of the public are of a limited nature. They possess no right of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no rights as regards the flow of the water, or the withdrawing of water, if the right of navigation is not affected. If that right is not interfered with, they are not, in my opinion, entitled to complain of operations by proprietors for the beneficial use and occupation of their properties. I think, therefore, that the principles involved in cases between conterminous proprietors are inapplicable to the present case.

The Lord President, in his opinion, says:

> The right of the public over a river of this class (that is, of a non-tidal river) is more like a right of way than the right of the public which is represented and protected by the Crown in the case of a navigable river where the tide ebbs and flows; and I am very much disposed to deal with this case as if it were just a right of way along this river, by means of the river, where it is fitted for purposes of navigation.

I agree with his Lordship that the right in question is very much the same as a right of way; and I, therefore, think the principle which was applied by the Second Division of the Court of Session in the recent case of *Sutherland* v. *Thomson* (22nd February, 1876) (1) has an application to the present case. In that case the question related to swing gates which had been erected across a public footpath; and there the Court held:

> That these gates were necessary for the proper use of the Respondent's farm, and were so constructed as not to be in any material degree injurious or obstructive to the public in the free use of the path.

And the Court found

> In point of law that the Respondent was entitled to erect said gates across the footpath and that the Appellant was not entitled to remove or destroy the same.

Lord *Ormidale*, in delivering his judgment in that case, after referring to the case of *Galbraith* v. *Armour* (2), before referred to, and to the case of *Marquis of Breadalbane* v. *Macgregor*, in this House, 14 July, 1848 (1) (in which a right was claimed for the public to have stances on a drove road for cattle using the road to rest and pasture upon, and was repelled), said:

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(1) 3 Court of Sess. Cas. (4th Series) 489.

(2) 4 Bell's Appeals, 374.

> If the public, then, has a mere right to pass over the road, and if the *solum* or ground passed over belongs to the conterminous proprietor, it would be a strong thing to hold that the proprietor, or his tenant with his leave and in his right, is not entitled, for the protection and service of his estate, to put up gates which do not unnecessarily, or in any material degree, obstruct the public in the exercise of their right of passage. No authority was cited in support of any such proposition. On the contrary, there is ample authority, I think, in the opposite direction.

And then his Lordship refers to three cases, in regard to gates across public roads, which he holds to support his proposition.

And Lord *Gifford*, in that case, said:

> In reality a public right of footpath is really the same as a servitude right, excepting that the dominant tenement is the whole kingdom, and not a special subject or estate, and no good reason seems to exist why the equitable rights of use which the law secures to the proprietor of a servient tenement should not be given to the proprietor of an estate burdened with a public footpath, provided only its use as a public footpath is not interfered with. It seems to follow from the judgment of the House of Lords in the case of *Galbraith* v. *Armour* (2), that the *solum* of the right of footpath is in the landlord of the ground, and not in the Crown: the public have nothing but a mere right of free passage over or through the lands which the Respondent in the appeal occupies. I am, therefore, of opinion in the present case, that the Respondent is entitled, in order to the enjoyment of his land for pasture, to put up such swing gates or wickets as while they will prevent his cattle from straying, will not impede the public right of way.

The case of *Grant and Others* v. *Duke of Gordon*, 9 March, 1871 (3), which had reference to the floating of timber from the Highlands down the river *Spey* to the sea, is entitled to consideration in the decision of the present case. It was a question between the upper proprietors on the River *Spey* and the Duke of *Gordon* as to the rights of the latter as proprietor of a cruive for salmon-fishing in the river near the sea. The report of the case bears, and the judgment was affirmed by your Lordships' House on the 20th of February, 1782, that the Court

> Considered a river by which the produce of the country could be transported to the sea to be a public benefit entrusted to the king as *pater patriæ for the*

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(1) 7 Bell's Appeals, 43.

(2) 4 Bell's Appeals, 374.

(3) Mor. Dic. 12,822.

behoof of his subjects in general which could neither be given away nor *abridged by him*; and that this transportation, as the *chief and primary use of the river*, if incompatible with the cruive fishing would prevail over it. They were at the same time of opinion that these rights were not incompatible, if not emulously used, and therefore proceeded to fix certain regulations according to which they were to be exercised.

The case is of importance in so far as while it recognises a right of floating timber down the river as a *quasi* navigable public right, and as the *chief and primary use of the river*, and which, if incompatible with the cruive fishing, would prevail over it, the Court at the same time held that that right of navigation was not so absolute that it was not subject to equitable restrictions when in competition with other rights. And, accordingly, the right of the upper proprietors was held subject to restriction and limitation as regards the periods during which it could be exercised, a restriction which could not have been exercised by the Court if the right of navigation had been held to be absolute and not subject to equitable limitations.

I am of opinion that the Appellants are entitled, as in a question with the Respondents as members of the public, to the full and free use of their property, and to erect a bridge connecting their property on one side of the river with their property on the other. The whole of the intervening *alveus* of the river is their property, and the Appellants were entitled to erect piers in the river, provided these piers did not obstruct the navigation. I think it has not been proved that the piers which have been erected do, in point of fact, having regard to their position with reference to the catch-water dyke, obstruct the navigation of the river; and therefore I am of opinion that the Respondents have no right to demand their removal.

The views upon which I proceed in advising your Lordships are founded upon what I consider to be the law of *Scotland*, as found by your Lordships in previous Scotch cases. I observe that Lord *Shand*, in his opinion, refers to two English decisions as explaining the opinions of English Courts with reference to the case of *Bickett* v. *Morris* (1). But it is necessary to bear in mind that these cases had reference to the rights of the public in tidal rivers, and, according to the law of *Scotland* as well as in *England*, the principles applicable to tidal rivers differ from those applicable to rivers above the influence of the tide; and in these cases the Attorney-General, as representing the right of property of the Crown in the *alveus* of the water, was a party as relator.

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(1) Law Rep. 1 H. L., Sc. 47.

I concur in the motion that the appeal should be sustained and the interlocutors complained of recalled with costs. I think the proper order is to recall the interlocutors appealed against; to find that the river *Leven* is a navigable river, free and open to the public; that the Appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not, in point of fact, interfere with or obstruct the navigation of the river; and with these findings to remit the case back to the Court of Session, with instructions *quoad ultra* to assoilzie the Appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session and in this House.

The following judgment was pronounced by the House:—

Ordered and adjudged,—That the interlocutors complained of be reversed; and the Lords find that the river *Leven* is a navigable river, free and open to the public; that the Appellants have no right to execute any works which will interfere with or obstruct the navigation thereof, or the free use of the towing-path along the banks of the river for the purpose of navigation; that the works complained of in the summons do not in point of fact interfere with or obstruct the navigation of the river. And with these findings, it is Ordered, that the cause be, and the same is hereby remitted back to the Court of Session in *Scotland*, with instructions *quoad ultra* to assoilzie the Appellants from the conclusions of the summons, and to find them entitled to the expenses incurred by them in the Court of Session: And

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it is further Ordered, that the Respondents do pay, or cause to be paid to the said Appellants, the costs incurred by them in respect of the said appeal to this House, the amount thereof to be certified by the Clerk of the Parliaments: And it is also further Ordered, that unless the costs, certified as aforesaid, shall be paid to the parties entitled to the same within one calendar month from the date of the certificate thereof the Court of Session in *Scotland*, or the Lord Ordinary officiating on the bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Agents for the Appellants: *Grahames & Wardlaw.*
Agents for the Respondents: *J. & J. Graham.*

END OF VOL II.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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BANKRUPTCY—*Bills of Exchange—Fraud.*] By arrangement previously made between the parties, *G.* drew bills on *S.*, and *S.* drew bills on *G.*; the acceptances were, in form, duly given. Both *G.* and *S.* were at the time, and were known by each other to be insolvent, and to be contemplating bankruptcy. Some of these bills, amounting to £1727, were purchased by *J.* for a sum of £200. *J.* had before been a discounter of bills, but not a purchaser of them. He knew at the time that *G.* was in embarrassed circumstances, but believed that *G.* possessed assets. He knew too that certain persons could give him full information as to *G.'s* affairs, but he made no inquiries from them. He declined to discount these bills, but purchased them. *G.* became bankrupt. *J.* proposed to prove against *G.'s* estate for the full amount of the bills. The trustee in bankruptcy gave him notice that "at the date of the bankruptcy of *G.* you were not the holder of the bills of exchange in the affidavit mentioned, or any of them, for value, and could not then have maintained an action against *G.* thereon, if he had not become bankrupt." In the County Court, in Bankruptcy, this objection of the trustee was adopted, and the proof of *J.* upon the bills was restricted to the £200. The Chief Judge in Bankruptcy reversed this decision, and ordered a proof to be allowed for the full amount of the bills. The Court of Appeal reversed this order, and restricted the proof to the amount paid for the purchase of the bills. On appeal to this House:—*Held*, first, that the form of the notice was sufficient under the Bankruptcy Orders of 1870. Secondly, that the order of the Chief Judge in Bankruptcy must be discharged, for that, under the circumstances proved in the case, *J.* must be taken to have had notice that the bills were fraudulent.—*Per* Lord *O'Hagan*:—*Quære*, whether the argument that the notice of objection to the title of a holder of bills was too vague and general in its terms, could be brought forward in this House on appeal, where no such point had been taken in the Court below.—*Per* Lord *Blackburn*:—Though since the repeal of the usury laws, the fact of taking a bill at considerable undervalue is not, of itself, sufficient to affect the title of the holder, it is an important element in considering whether the man who gave the undervalue was acting *bonâ fide*, in ignorance and error, or was assisting in committing a fraud, and avoided making inquiries because they might be injurious to him. JONES *v.* GORDON - - - **H. L. (E.)** 616

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CANADA, LAW OF—*Commissioners in Expropriation—Statute of Canada, Act 27 & 28 Vict. c. 60—Order of Removal by Superior Court—Right of Appeal to Court of Queen's Bench.*] The Respondents and one *M.*, having been appointed Commissioners in expropriation under Provincial Act 27 & 28 Vict. c. 60, made their valuation of certain land which had been expropriated. On petitions to the Superior Court by certain contributories and the Appellant corporation, the Respondents were removed from office on the ground that they had in their valuation adopted a principle which was so palpably erroneous that its adoption amounted to a want of diligence which justified the Court in ordering their removal. This decision was subsequently reversed by the Court of Queen's Bench:—*Held*, that an appeal lay from the Superior Court to the Court of Queen's Bench from the above order of removal, which having been made after proceedings usual in an ordinary suit, was to all intents and purposes a final judgment of the Superior Court within the meaning of the 1115th article of the *Code of Civil Procedure.* It is not a palpably erroneous principle in valuing land under the above-mentioned Act to take into consideration its prospective capabilities; nor does the adoption of such a principle justify a finding of "want of diligence" under sect. 13, sub-sect. 9 of the said Act. Mayor, &c., of Montreal *v.* Brown [P. C. 168

2. —— *Controverted Elections Act*, 1875—*Quebec—Royal Prerogative as to admitting Appeal.*] The Petitioner having been declared duly elected a member to represent the electoral district of *Montmanier*, in the Legislative Assembly of the Province of *Quebec*, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the *Quebec Controverted Elections Act*, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council:—*Held*, that such application must be refused.—Although the prerogative of the Crown cannot be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the above Act and the previous legislation is, that it was the intention of the Legislature, under this Act, which was assented to by the Crown, to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. Théberge *v.* Laudry P. C. 102

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3. —— *Marriage Contract—Reprise—Wife's Consent to Husband's Hypothecation—Notarial Act—Formalities of Execution.*] By the first of two instruments made in 1808, on the marriage of *J. F.* with *J. S.*, the immoveable property in question in this appeal was conveyed by way of donation by *J. S.*'s mother to the said *J. F.* and *J. S.* By the second, *J. F.* and *J. S.* agreed *inter se* that they would live in community; that all immoveable and other property belonging to either of them at the date of the marriage should be brought into community; that it should for the purposes of the community be deemed moveable; with a clause of *reprise*, to the effect that when the community was dissolved by death or otherwise, the wife might at her option reclaim or resume all property brought in on her part clear and free from the debts and charges of the community, subject to this, that in any case in which she had bound herself, or assented, to any particular debt, or had a judgment pronounced against her by a competent Court, she was to rely upon and have the benefit of her husband's estate, and should have as from the date of the marriage a *hypothec* upon her husband's estate for the fulfilment of that contingent obligation.—By a notarial act passed on the 26th of January, 1855, whilst the community still subsisted as to the said immoveable property, the same was hypothecated to the Appellants by the said *J. F.* and *J. S.* as sureties for the debt of their son. The act further contained an express consent by the mother (*J. S.*) to the hypothecation of the said property by her husband in the Appellants' favour, and an express renunciation of any rights, whether of property or hypothec, which she might have had, which could in any way come into competition with the security so created, whether by her own or her husband's act.—In a suit (in 1869) by the Respondent, who claimed under a subsequent act of donation from *J. S.*, to set aside the notarial act, it was contended that the same was fraudulent, that certain informalities of preparation, expression, and execution, deprived it of its probative character, and that otherwise it did not bind the title which the Respondent derived from *J. S.*—The informalities were—1. That pages 7 and 8 of the act appeared to have been written after pages 9 and 10, and had not been initialed; 2. That the house notified as the place where the contract was passed was incorrectly stated:—*Held*, that the act was not fraudulent, was well executed, authentic, and probative, and was sufficient in law to bind the title which the Respondent claimed through the donation of *J. S.*—According to the French law contained in the Ordinance of *Francis* I. of October, 1535, or the Canadian law contained in the Edict of the Council of State of 1733, or the principle upon which these laws are framed, the initialing of the above pages 7 and 8 was not essential, the sense of the deed not being complete, and the deed not being coherent without them.—According to the practice in *Canada*, and possibly according to the right construction of the Ordinance of *Blois*, Art. 167, the house where the notary completes a contract by his signature is the proper place to be notified as the place where such contract was passed. If, however, there is error in notifying the place of passing the contract, the consequence

CANADA, LAW OF—*continued.*
is not nullity, nor that the act loses its notarial and probative character, but only that it must be proved (as was done in this case) that the place where it actually was passed was within the jurisdiction of the notary.—Assuming that *J. S.'s* contract of suretyship was null and ineffectual, and also her hypothecation, so far as it was connected with her invalid obligation of suretyship; yet her consent to her husband's hypothecation, and her waiver of all claims in favour of the Appellants, were binding upon her. The clause of *reprise* did not enable her to resume or reclaim anything as against a creditor in whose favour she had consented to the act of her husband during the community.—*David* v. *Gagnon* (14 Low. Can. Rep. 110) approved. HAMEL *v.* PANET - **P. C.** 121

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CAPE OF GOOD HOPE, LAW OF—*Cape of Good Hope Act, No.* 10 *of* 1864—*Curators of Public Roads—Compensation.*] The Respondent being proprietor of a certain perpetual quit-rent tenure, the Appellants as curators of public roads under Act No. 10 of 1864, and possessed under sect. 3 of all the rights which were vested in the Commissioners of Roads by Act No. 9 of 1858, contended that they had a right to enter the Respondent's land and take away gravel for the repair of public roads:—*Held*, that such contention was correct. Under the terms of the Respondent's grant, and by established usage, the Government had such right, and under the Acts above mentioned such right had been transferred to the Appellants.—*Semble*, if the gravel had been taken from land of the Respondent which had been improved by cultivation, irrigation, or otherwise, he would have been entitled to compensation under sect. 12 of Act No. 9 of 1858, to be estimated in the manner provided by that section. DIVISIONAL COUNCIL OF THE CAPE DIVISION *v.* DE VILLIERS [**P. C.** 567

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CHAMPERTY—*Maintenance—Agreement to share the Subject of Litigation, when against Public Policy—Non-liability of Stranger to the Record for Costs of Suit, in the absence of Malice and Want of Probable Cause.*] The Respondent, as attorney and mooktear of *M.* and his wife, managed actions of ejectment and mesne profits against the Appellants, advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be repaid all advances with interest at 12 per cent., and should have a third part of "the clear net profits" of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the said suits, which, on appeal, were decreed in favour of *M.* and his wife by the High Court, but were afterwards dismissed by the Privy Council with costs, which *M.* and his wife were utterly unable to pay. Pending that appeal, the Respondent purchased the property in suit, and thereafter conducted the appeal in his own interest.—In an action by the Appellants against the Respondent to recover the amount of the said costs, it was averred, but not proved, that the actions were brought or instigated by the Respondent maliciously and without probable cause; and, failing such proof, it was contended, (1), that the agreement and acts of the Respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the Appellants had suffered special damage from them; (2), that the Respondent was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—*Held*, that the English laws of maintenance and champerty are not of force as specific laws in *India.*—A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.—Whatever the rights of the parties to this agreement, it does not constitute a punishable offence, and cannot give to the Appellants, who were strangers to it, a right of action against the Respondent.—Such agreement created no legal privity between the Appellants and the Respondent from which a promise can be implied on the part of the Appellants to pay the Respondent his costs of the former action, on which an action of contract can be founded; nor does it establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause.—An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause.—*Cotterell* v. *Jones* (11 C. B. 735) approved. RAM COOMAR COONDOO *v.* CHUNDER CANTO MOOKERJEE - - - - - **P. C.** 186

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EVIDENCE—*Presumption of Paternity.*] Where, after open courtship and constant intercourse, a man and woman (she being ultimately in an advanced state of pregnancy) hurry on their marriage to prevent, or to mitigate, scandal; and where in less than seven weeks after the marriage she gives birth to a child; the presumption of the husband's paternity to that child is next to insuperable.—*Per* Lord *Cairns*, L.C.:—The presumption is not a *presumptio juris et de jure*, but a presumption of fact:—*Held*, by the House, affirming the decision of the Second Division of the Court of Session, that the *onus* of establishing the husband's denial of paternity lay on himself, and that he had wholly failed to discharge that *onus*. Gardner *v.* Gardner **H. L. (Sc.)** 723

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HARBOURS CLAUSES ACT—*New Statutory Liability—Piers and Harbours—Shipping—Act of God.*] A statute which refers to the matter of a Common Law liability and declares to whom it shall attach, will not thereby create a new and extended application of that liability unless it contains words expressly declaring such a purpose.—The 10 Vict. c. 27 (*The Harbours, Docks, and Piers Act*, 1847) enacted that "the owner of every vessel, or float of timber, shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel, or float of timber until sufficient security has been given for the amount of damage done by the same." There was a proviso exempting the owner from liability in cases where the vessel was in charge of a licensed pilot whom the owner was bound by law to employ:—*Held* (affirming the judgment of the Court of Appeal),

HARBOURS CLAUSES ACT—*continued.*
that, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable.—*Per* Lord *Cairns*, L.C.: The clause is a clause of procedure only, dealing with the mode in which a right of action already existing shall be asserted, but not creating a new right of action.—Lord *Govdon, diss.*, on the ground that the intention of the Legislature in passing the Act must be decided by the ordinary meaning of the words used, and here the words used in the first sentence of the section were words creating a liability without any restriction whatever. RIVER WEAR COMMISSIONERS *v.* ADAMSON - - **H. L. (E.) 743**

HONG KONG, LAW OF—*Bankruptcy Ordinance*, 1864, *Arts.* 163, 165, 167, 168, 169—*Fraudulent Preference—Rights of Trustees under Art.* 165.] In a suit by trustees appointed under a deed executed by certain bankrupts under the 165th Article of the *Bankruptcy Ordinance*, 1864, of *Hong Kong*, to set aside certain conveyances of real property made by the bankrupts to the Appellants, on the ground that the same were given by way of fraudulent preference:—*Held*, that the suit could not be maintained. Articles 168 and 169 must be read as supplementary to Article 167, and all apply only to deeds which come within the provisions of Article 163. A deed executed under Article 165 must be registered, or it will be inadmissible in evidence, but not coming within the terms of Article 167 it does not give the trustees appointed thereunder all the rights of action which would have accrued to assignees in bankruptcy.—*Pearson* v. *Pearson* (Law Rep. 1 Ex. 310) approved. BENECKE *v.* WHITTALL **P. C. 602**

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INSURANCE—*Life Policy—" Never been heard of"—Misdirection—Bill of Exceptions.*] A policy on the life of *R. Nutt* was granted in 1863. An action was brought upon it in 1874, and the question was whether *Nutt* was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, and said that they had not heard of him for more than seven years. On cross-examination, they said that a niece of his had said that when she was in *Melbourne*, in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle *Nutt*, but he was lost in the passing crowd before she was able to get to speak to him. No effort appeared to have been made to find him at *Melbourne*, and the other relatives believed the niece to have been mistaken. The jurymen expressed a similar opinion. The Judge directed the jurymen that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive and well within the last three years; and still less could they say that he had never been heard of, when all the members of the family stated that they had heard what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." And, lastly, His Lordship said to the jury, "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the Defendants." The Court of Appeal had considered this to be a misdirection, and had ordered a *venire de novo*. On appeal to this House, the Lords were equally divided, and so the decision of the Appeal Court stood affirmed.—*Per* Lord *Blackburn*: When there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go. PRUDENTIAL ASSURANCE COMPANY *v.* EDMONDS - - - **H. L. (E.) 487**

2. —— *Marine Insurance — Time Policy — Warranty of Seaworthiness — Perils insured against.*] A policy of insurance was effected on ship from the 22nd of January, 1872, to the 23rd of January, 1873, both inclusive. These words were written in on a printed form, which also contained, in print, the words, *at and from*, and *for this present voyage*, and other similar words which were commonly found in the forms of a voyage policy, and which had not been erased or struck through:—*Held*, that the policy was really a time policy, and its character was not affected by the printed words thus negligently left in the form.—In a time policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy.—*Gibson* v. *Small* (4 H. L. C. 353) supplemented by *Thompson* v. *Hopper* (6 El. & Bl. 192), and *Fawcus* v. *Sarsfield* (6 El. & Bl. 192), declared to have set at rest all controversies on this subject.—If a shipowner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover.—A time policy was effected on an iron steamer, the *Frances*, of 705 tons burden, then lying in the yard of its owner, a shipwright. It had been put under repair, and it was stated in evidence that there had not been any stint placed upon the repairs, and that the marine engineer

INSURANCE—*continued.*
who superintended the repairs, and the workmen who executed them, believed them to be completely satisfactory. It was expressly found that if the ship was unseaworthy the assured was ignorant of the fact. The ship went with nothing but a deck cargo of iron machinery from *London* to *Gothenburg*—made more water on the voyage than could have been expected from the state of the weather—ceased to do so on getting into harbour—was examined, and its condition on the voyage could not be accounted for; and in a few days afterwards took on board a cargo of oats and 380 tons of iron, and a deck loading of timber; started from *Gothenburg*, encountered in the open sea very bad weather which put out the fires, ran for the port of *Hull*, could not make the port, ran ashore, and after some time was broken up and became a total wreck:—*Held*, that these facts shewed a loss by perils insured against—the perils of the sea—and that the assured was entitled to recover as for a total loss.—A loss caused immediately by perils of the sea is within the policy though it might not have occurred but for the concurrent action of some other cause which is not within the policy. Dudgeon *v.* Pembroke [H. L. (E.) 284

JAMAICA, LAW OF—*Jamaica Act, No.* 41, *of* 1872, *s.* 19—*Service of Summons on a Company domiciled abroad*—"*Person residing out of Jamaica.*"] In an action against the Appellant company (incorporated by letters patent to the Queen, and domiciled in *England*) a writ of summons was served, in pursuance of a Judge's order to that effect previously obtained, on its duly appointed superintendent carrying on its business in *Jamaica*:—*Held*, that this was good service on the company under sect. 19 of "the *Supreme Court Procedure Law*, No. 41, of 1872." The section applies to corporations as well as to natural persons.—*Ingate* v. *Lloyd Austriaco* (4 C. B. (N.S.) 704; 27 L. J. (C.P.) 323) commented upon. Royal Mail Steam Packet Company *v.* Braham [P. C. 381

JOINT DEBTS—Proof for, in bankruptcy—*New South Wales* - - - 589
See New South Wales, Law of.

JURISDICTION—Court of Justiciary in *Scotland*
See Scotch Law. 3. [41

JUSTICIARY COURT—Appeal from - 41
See Scotch Law. 3.

LANDLORD AND TENANT—*Notice to Repair—Suspension of Effect of—Equitable Relief against Forfeiture.*] Where a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejectment founded on the original notice.—A notice to repair, within six months, houses held on lease by the *Metropolitan Railway Company*, was given on the 22nd of October, 1874, to expire on the 22nd of April, 1875. It was answered by a letter of the 28th of November, suggesting that the lessor might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter on the 30th of December, that it was £3000. The lessors' solicitors on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No farther communication on this subject took place till the 19th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale" the company would take in hand the repairs. On the 20th of April the solicitors for the Appellant wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22nd of April the notice expired, and on the 28th the ejectment was served. After verdict for the Plaintiff and judgment in the Court below:—*Held*, that the company was entitled in Equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair. Hughes *v.* Metropolitan Railway Company - H. L. (E.) 439

LEGACY—Statute of Limitations—Express trust
See Limitations, Statute of. [215

LIABILITY—Statutory—Shipowner - 743
See Harbours Clauses Act.

LICENSE—Patent—Title of licensee - 423
See Patent. 2.

LIFE INSURANCE - - - - 487
See Insurance. 1.

LIMITATIONS, STATUTE OF—*Will—Express Trust—Delay—Deed—Charge of Fraud—Costs.*] The *Statute of Limitations* does not apply to an express trust for a legacy, yet where the beneficiary or his representative has allowed a very long time to elapse without attempting to enforce the trust, Equity will, when enforcing it, apply, as to interest on the legacy, the principle of the statute.—A legatee in a will was described as "*J. E.*, the son of *S. E.*, by *M. J.*, or *M.*, or *E.*, his wife." There being no doubt as to the identity of the person intended, the question whether he was the son born in lawful wedlock or not, was utterly immaterial, for he was the person designated as the legatee.—If on the footing of a supposed illegitimacy the title of the *cestui que trust* to the legacy is disputed and denied by the trustee, and the former is thereby induced to accept from the trustee a smaller sum than that to which he is entitled under the will, and by deed to release the trustee from the payment of the legacy, Equity will not permit such a transaction to stand.—Even without any evidence of fraud, such a transaction is null and void.—

LIMITATIONS, STATUTE OF—*continued.*

Where there is upon the face of a bill that which will give a right to relief in Equity, that right will not be affected by the circumstance that there are also in the bill allegations of personal fraud, which might give a farther or a different right to relief, if they were proved. If they are not proved the proper course is to dismiss, with costs, so much of the bill as is founded on them, but not to dismiss the bill itself.—A trustee who, on untenable grounds, withholds trust money from his *cestui que trust* may commit what in Equity may be considered a fraud, without being chargeable with personal fraud.—A legacy was given on an express trust in 1807; it was not paid to the original legatee. He became insolvent, released the legacy, and died. His only child came of age in 1849. Litigation on matters connected with the legacy, but not upon a direct claim to it, was going on in 1865. *A.* took an assignment of the legacy, and also became the administrator of the original legatee's estate, and the assignee under his insolvency; in 1872 he filed a bill to enforce payment of the legacy with interest. He was held entitled to the assistance of a Court of Equity in respect of it.—A will, in 1807, began thus; "I hereby appoint my after-named executor, *Charles E.*, my youngest brother, to be trustee for the following legacies." Several were then named, and the will went on, "Considering that money will be more essential to my dear brother *Samuel E.* than a distant possession of land, I bequeath to *Samuel E.*, during his natural life the interest of £3000, and, after his death, to his eldest son, *James E.*, by his last wife, *Margaret J.*, or *M.* or *E.*, till he attains twenty-one, and then to obtain the principal. I order that my youngest brother *Charles E.* shall be liable to all my lawful debts of every description, and pay them as soon as he can, and also pay my legacies when regularly due, and all expenses, &c.; and to enable him to do all this, I bequeath, unconditionally, to him all my estates and landed property, with all emoluments belonging to them, in the county of *Armagh;* I also bequeath to him, the said *Charles*, all my estates, &c., with all their emoluments, in the county of *Louth*, or elsewhere, &c.:—*Held*, that the will constituted an express trust, so as to prevent the *Statute of Limitations* applying to it. Payment of the legacy with interest was therefore directed.—But, there having been no proceedings taken until 1872 with the direct purpose of enforcing payment of the legacy, (though other proceedings connected with the will had been going on,) and the estates having passed into the hands of the representatives of the original trustee, the interest on the legacy was, in the discretion of the House, directed to be calculated only from six years before the filing of the bill.—*Quære*, whether, on the words of the above will, the estate in the county of *Louth* was, like the estate in *Armagh*, subject to the trust for payment of the debts and legacies. As its liability to the trust had never been made the subject of dispute, and the Courts below had proceeded on the assumption that it was so liable, this House did not interfere with the decision in that respect.—The word "unconditionally," as used in this will, did not mean without any condition annexed to the payment of the legacies, but that the trustee was made absolute owner of the fee simple for the purpose of doing what the testator had ordered. Thompson *v.* Eastwood [H. L. (I.) 215

MAINTENANCE OF LUNATIC—Two funds 300
See Will. 2.

MAINTENANCE OF SUIT - - - 186
See Champerty.

MARINE INSURANCE - - - 284
See Insurance. 2.

MARRIAGE—Suit for declarator of—Delay—*Res judicata* - - - - 519
See Scotch Law. 4.

—— Contract of—Law of *Lower Canada* - 121
See Canada, Law of. 3.

MASTER—Duty of—Bottomry - - 156
See Ship. 1.

MINE. A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper and ordinary working of his own mine, without default or negligence.—But where for his own convenience he does something, *e.g.*, divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly and mainly occasioned by an act of nature, his own conduct in not so forming the new and diverted course for the stream of form and of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability.—Circumstances which will create liability in such a case. Fletcher *v.* Smith [H. L. (E.) 781

—— Support of surface—Subsequent waterflow
See Support. [95

MINERALS—Gold under waste land in *Victoria*
See Victoria, Law of. [163

MISDIRECTION—Duty of Judge - - 487
See Insurance. 1.

MONTREAL—Commissioners in expropriation
See Canada, Law of. 1. [168

MORTGAGE—Ship—Freight - - 636
See Ship. 4.

MUTUAL CREDIT—Bankruptcy—Scotch Law
See Scotch Law. 1. [531

NAVIGATION—Right of - - - 839
See River.

—— Rules of - - - - - 389
See Ship. 3.

NEW SOUTH WALES, LAW OF—*Bankruptcy—Proof against Partnership Estate in respect of Joint Debts.*] *H.* and *C.* having with *W. S.* and two other persons for themselves and each of them, and any two, three, or four of them, jointly and severally bound themselves to the Respondent in a large sum of money to secure advances to be made to *W. S.; H.* and *C.*, who carried on business in partnership, were adjudicated insolvents, both in respect of their separate estates

NEW SOUTH WALES, LAW OF—*continued.*
and their joint estate, upon their own application, under the local Insolvent Act.—*C.* and *H.* each entered the debt (which was unconnected with their partnership business) to the Respondent under the bond in the schedule of his separate estate. The Respondent was subsequently admitted to prove the same against the joint estate:—*Held*, that, under the bankruptcy law of *England* as it existed in 1841, which had been introduced into the colony concurrently with the Insolvent Act, the Respondent was properly admitted to prove against the joint estate *pari passu* with the partnership creditors.—No distinction can be drawn between joint debts so as to exclude from proof against the joint estate of any joint debt which is not shewn to have been incurred in the strict sense of the term as a partnership transaction, and as arising out of partnership business, either under the said bankruptcy law or under sects. 4 or 17 of the Insolvent Act. HOARE *v.* ORIENTAL BANK CORPORATION - **P. C. 589**

NEWFOUNDLAND, LAW OF — *Legislature of Newfoundland—35 & 36 Vict. c. 45—Territorial Dominion—Bays—Injunction—Exclusive Use of Territory for Telegraphic Communication—Newfoundland Act*, 17 *Vict. c.* 2.] Injunction granted by the Supreme Court of *Newfoundland* to prevent Appellants from infringing certain exclusive rights granted to the Respondent company under 17 Vict. c. 2.—It appeared that the Appellants had brought and laid a telegraph cable to a buoy more than thirty miles within *Conception Bay*, which lies on the east of *Newfoundland*, between two promontories distant rather more than twenty miles, the average width of the bay being fifteen miles, the distance of the head of the bay from the two promontories being respectively forty and fifty miles. The said buoy and cable were more than three miles from the shore of the bay.—*Held*, (1), that according to the true construction of 17 Vict. c. 2, the intention of the Legislature of *Newfoundland* was to prohibit for the benefit of the Respondent company the use of any part of the territory of *Newfoundland* by any other person for telegraph communication, whether within the island or as a mere means of transit between places outside the territory.—(2.) That by 59 Geo. 3, c. 38, the Imperial Legislature asserted exclusive dominion (never since questioned) over the said bay, and by 35 & 36 Vict. c. 45, conferred upon the Legislature of *Newfoundland*, the right to legislate with regard to it.—*Quære*, as to the territorial dominion over a bay of configuration and dimensions such as that of *Conception Bay*, either under the English Common Law or under the general law of nations. DIRECT UNITED STATES CABLE COMPANY *v.* ANGLO-AMERICAN TELEGRAPH COMPANY - - **P. C. 394**

NOTARY—Formalities of Act - - 121
See CANADA, LAW OF. 3.

NOTICE—Scotch Law—Order to enlarge churchyard - - - - - - 79
See SCOTCH LAW. 2.

—— To repair—Forfeiture - - - 439
See LANDLORD AND TENANT.

OCCUPATION—Poor-rate - - - 263
See POOR-RATE.

PARALLEL—Meaning of word - - 423
See PATENT. 2.

PARTIES—Joinder of—Scotch law - 344
See SCOTCH LAW. 5.

PARTNERSHIP—Proof against, in bankruptcy—*New South Wales* - - - 589
See NEW SOUTH WALES, LAW OF.

PATENT—*Combination of Old and New Forms—Specification.*] A patent may be granted not only in respect of a whole and complete thing described, but in respect, also, of a subordinate integer of that whole.—But then the invention must be so described as to make it clear in respect of what (the whole, or the integer,) the patent has been asked for and granted.—Where a person has invented an improvement in the form of a particular apparatus or machine, but combines that individual improvement with other things which are not his inventions, his specification must claim that particular individual thing, and not leave it doubtful whether the claim is made for the whole combination, of which that thing really only forms a part.—In a drawing of a machine attached to a specification there was shewn an intervening space, or opening, between two parts of the machine, the object of the patent; it was intended as the arching of a cutter-plate, but this was not referred to and explained in the specification. In the specification there was the statement of an evil in existing machines, and upon careful examination, by a skilful person, he might suppose that the space exhibited in the drawing was intended to obviate this evil, but there was no statement to that effect, nor was the form of the opening described, and described as a necessary quality of improvement in the machine. This form was afterwards relied on as one of the great improvements in the combination of the patented apparatus:—*Held*, that as it had not been properly explained, described, and claimed, the specification was defective.—There were three other things which, with this one, constituted a combination insisted upon as a novelty. Those three things were old,—and the mere combination of the four without a clear and sufficient description of the purpose and use of that which might be claimed as new and valuable, and without a distinct claim in respect of the combination itself (even if such a claim would have been valid) was held not sufficient to support the patent. CLARK *v.* ADIE - - - - **H. L. (E.) 315**

2. —— *Licensee—Foreign Specifications—Evidence—"Parallel."*] A licensee under a patent cannot, in any way, question its validity during the continuance of his license. But he may shew that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it.—*Per* Lord *Blackburn:* A licensee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to shew that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right:—*Semble*, that in an act on on a patent, where such an issue has been raised, evidence of the existence of foreign specifications of

PATENT—*continued.*

an earlier date, preserved in and obtained from the Patent Office, might be admissible. Observations on this matter.—The words used in a patent must be construed, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found.—In this case the word "parallel" was construed in its popular and not its purely mathematical sense. Clark *v.* Adie (No. 2) [H. L. (E.) 423

PEERAGE—*Shifting Clause.*] Where the Crown is pleased to refer to the House of Lords the consideration of a patent of peerage, it becomes the duty of the House to inform the Crown what is the construction to be put upon the terms of any clause in the patent.—One clause in a patent may be invalid without affecting the validity of the patent itself.—There can be no Use or Trust in the case of a peerage.—Therefore where, in a patent of peerage, there were successive limitations of the peerage in the ordinary form of descent, and then a clause was introduced which, on the happening of a collateral event, would transfer the enjoyment of the peerage from the existing peer and his heirs to a new holder, such clause was held to be invalid.—A patent granted the dignity of Baroness *Buckhurst* to a lady for her life, then to *R. W.*, her second son and his heirs male, in default, to *M. S.*, her third son and his heirs male, and so on to the other younger sons of the same lady. The patent then went on with this proviso : "And we will that if the said *R. W.*, or any other person taking under this patent, shall succeed to the Earldom of *D. l. W.*, and there shall, upon, or at any time after, the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, then, and as often as the same shall happen, the succession to the honours and dignities hereby created shall devolve upon the son of the said *Elizabeth*, &c., or the heir who would be next entitled to succeed to the dignity of Baron *Buckhurst* if the person so succeeding to the Earldom of *D. l. W.* was dead without issue male :"—*Held*, that this proviso was invalid, and that *R. W.*, the first baron under the patent, who, as such baron, had sat and voted in the House of Lords, though he succeeded to the Earldom of *D. l. W.*, continued to hold the barony as before.—*Per* Lord *Chelmsford: Semble*, that if *R. W.* had become Earl *D. l. W.* during the life of his mother, and before he himself succeeded to the barony, it might have gone to his next brother, but it having once vested in *R. W.* it could not be divested by the effect of the proviso. Buckhurst Peerage [H. L. (E.) 1

PERILS OF THE SEA - - - 284
See Insurance. 2.

PIER—Damage to ship—Act of God - 743
See Harbours Clauses Act.

POOR-RATE — *Thames Conservancy* — *Derrick* — *Occupation*—*License*—*Poor's Rate.*] The 20 & 21 Vict. c. cxlvii. (*The Thames Conservancy Act, Private*) vests in certain persons, thereby created Conservators of the River *Thames*, all the interest of the Crown and of the Lord Mayor and Corporation of the City of *London* in the bed and soil of the river. It does so for the purposes stated in that Act, for the execution of which various powers are conferred upon the Conservators.—In execution of some of those powers the Conservators passed a resolution giving permission to the Appellants to lay down moorings, attached to which they might place a derrick hulk, 510 feet from the river wall; the work of laying down these moorings was to be done to the satisfaction of the Conservators, and was to remain "on condition that the accommodation be assessed, and the rent paid thereon; and that the hulk be not used for storing coals." The purpose of so mooring the hulk was that of fastening and holding coal vessels, while they were unloading their coals, and transferring their cargoes to barges and lighters. The derrick hulk was held in its position by chains and anchors set in large stones, and ballast placed in holes dug in the bed of the river, and the work of so placing the stones and the ballast was performed by the workmen of the Conservators, the payment for the work being furnished by the Appellants. The Conservators reserved to themselves, under the 91st clause in the Act, power to remove the hulk at a week's notice. The derrick hulk could only be removed from the moorings by being itself loosened from the chains attached to the stones and ballast in the bed of the river; these holdings in the river continuing fixed as before:—*Held*, that the Appellants were liable to be rated to the relief of the poor of the parish (within which lay that part of the river where the derrick hulk was moored) in respect of the profit derived by them from its employment, as they must be treated as persons in occupation of a part of the soil and bed of the river.—*Per* Lord *O'Hagan:* They were as much occupiers of the land as if they had put a stage upon piles driven into the bed of the river, or had erected a house there.—The grant of the right to lay down these moorings, and then to occupy them through the instrumentality of this hulk, was an exercise of the parliamentary powers given to the Conservators under their Act.—On the facts of this case the moorings must be taken to be the property of the Appellants, subject only to the power of removal reserved by the Conservators. Cory *v.* Bristow H. L. (E.) 262

—— *Victoria* - - - - - 574
See Victoria, Law of. 2.

PRACTICE — Law of *Jamaica* — Service out of jurisdiction - - - - 381
See Jamaica, Law of.

—— Scotch law—Joint complaint and joint defence - - - - - 344
See Scotch Law. 5.

PRESBYTERY—Order to enlarge churchyard—Notice - - - - 79
See Scotch Law. 2.

PRESUMPTION—Paternity - - - 723
See Evidence.

PROBATE DUTY—*Victoria* - - - 560
See Victoria, Law of. 3.

PROFESSIONAL ASSISTANCE—Sale of reversion
See Sale of Reversion. [814

PUBLIC POLICY—Champerty - - 186
See Champerty.

QUEBEC CONTROVERTED ELECTIONS ACT 102
See Canada, Law of. 2.

RACECOURSE—Rateability—*Victoria* - 574
See Victoria, Law of. 2.

RAILWAY AND CANAL TRAFFIC ACT. The *Traffic on Railways and Canals Act*, 1854 (17 & 18 Vict. c. 31), applied to the whole traffic upon railways, and not merely to their passenger traffic, but only applied to traffic on railways or canals.—The *Railways Clauses Act*, 1863 (26 & 27 Vict. c. 92), s. 31, extends the Act of 1854 to steam vessels, and the traffic carried on thereby, which vessels railway companies own or work.—The *Railways Regulation Act*, 1871 (34 & 35 Vict. c. 119), s. 12, applies to cases where a railway company under a contract to carry persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the company, nor worked by the company, and the company becomes liable for damage in like manner as if the vessel had belonged to the railway company.—The 7th section of the Act of 1854 did not allow of the limitation of the liabilities of railway companies, except by such "conditions" as should be held by a Court or Judge to be just and reasonable, and be embodied in a special contract, which should be signed by the owner of the goods.—The word "servants" in the *Railway and Canal Traffic Act*, 1854, s. 7, means not merely servants, properly so called, but also the agents (not strictly servants), employed by railway companies to do for them work which they are under a contract with others to perform.—*Machu* v. *The London and South Western Railway Company* (2 Ex. 415), approved.—A railway company made contracts to carry animals from a port of *Ireland* to a town in *England* on "through" tickets. The paper or ticket contained, in substance, the following condition: "that with respect to any animals, &c., booked through, by them or their agents, for conveyance partly by railway and partly by sea, or partly by canal and partly by sea, such animals, &c., will only be so conveyed on the condition that the company shall be exempt from any liability for any loss or damages which may arise during the carriage of such animals, &c., by sea, from the act of God, &c., accidents from machinery, &c., and all and every other damages and accidents of the seas, rivers, and navigation of whatever nature and kind soever, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. Nor will the company be responsible for loss of, or damage to, animals, &c., arising from damages or accidents of the sea, or of steam navigation, the act of God, &c., jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels":—*Held*, that the words "master and crew of the company's vessels" in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself; and that the condition was unreasonable and void.—If a railway company is guilty of an illegality by working steamboats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steamboats. Doolan *v.* Midland Railway Company - - H. L. (I.) 792

RATIFICATION—Company—Act of directors 366
See Victoria, Law of. 1.

REGISTRATION—Transfer of land—*Victoria* 110
See Victoria, Law of. 4.

REPAIRS—Forfeiture after notice - - 489
See Landlord and Tenant.

REPRISE—Wife's consent to husband's hypothecation—Canadian law - - 121
See Canada, Law of. 2.

RES JUDICATA—Suit for declarator of marriage
See Scotch Law. 4. [519

REVERSION—Sale of - - - 814
See Sale of Reversion.

RIPARIAN OWNER—Rights of - - 839
See River.

RIVER—*Navigation above Tide—Not a Public Right—Proprietor's Rights on both Sides.*] *Per* Lord *Hatherley:* There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way.—*Per* Lord *Blackburn:* The public who have acquired by user the right to navigate on an inland water have no right of property.—*Per* Lord *Gordon:* The right which the public have is a mere right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate.—*Per* Lord *Blackburn:* The owner of the banks of a non-navigable river may without any illegality build a mill-dam across the stream within his own property, and divert the water into a mill-lade without asking the leave of the proprietors *above* him, provided he does not obstruct the water from flowing as freely as it was wont; and without asking the leave of those proprietors *below* him if he takes care to restore the water to its natural course before it enters their land.—*Per* Lord *Gordon:* The right of a conterminous proprietor in the stream dividing his property from that of his opposite neighbour is very different from that with which your Lordships are now dealing.—*Per* Lord *Blackburn:* I think it clear law in *England*, that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident, and that the Defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be

RIVER—*continued.*

swept away. I advise your Lordships to hold that there is no such power in *Scotland.* Orr Ewing v. Colquhoun - - H. L. (Sc.) 839

ROAD—*Cape of Good Hope*—Rights of curators
See Cape of Good Hope, Law of. [567

ROYAL PREROGATIVE—Appeal to Queen in Council - - - - 102
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SAILING RULES - - - - 389
See Ship. 3.

SALE OF GOODS—*Contract—Absence of a formally signed Contract—Conduct of Parties supplying the Want of it.*] Circumstances in the conduct of two parties may establish a binding contract between them, although the agreement reduced into writing as a draft, has not been formally executed by either.—In such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form.—*B.* had for some years supplied the *M. Railway Company* with coals. At last it was suggested by *B.* that a contract should be entered into between them. After their agents had met together the terms of agreement were drawn up by the agent of the *M. Company* and sent to *B.* *B.* filled up certain parts of it which had been left in blank, and introduced the name of the gentleman who was to act as arbitrator in case of differences between the parties, wrote "approved" at the end of the paper, and signed his own name. *B.'s* agent sent back the paper to the agent of the *M. Company*, who put it in his desk, and nothing farther was done in the way of a formal execution of it. Both parties for some time acted in accordance with the arrangements mentioned in the paper, coals were supplied and payments made as therein stated, and when some complaints of inexactness in the supply of coals, according to the terms stated in the paper, were made by the *M. Company*, there were explanations and excuses given by *B.*, and the "contract" was mentioned in the correspondence, and matters went on as before. Finally disagreements arose, and *B.* denied that there was any contract which bound him in the matter:—*Held*, that these facts, and the actual conduct of the parties, established the existence of such a contract, and there having been a clear breach of it *B.* must be held liable upon it.—*B.* was the chief partner in a partnership of three persons. The word "approved" written by him and signed with his name was treated as an assent binding on the partnership, whose names were mentioned in the paper, although the usual form of signature of the partnership was that of "*B. & Sons.*"—A mere mental assent to the terms stated in a proposed contract would not be binding, but acting upon those terms, by sending coals in the quantities and at the prices mentioned in it, amounted to sufficient to shew the adoption of the writing previously altered and sent, and to constitute it a valid contract.—*Per* Lord *Blackburn*:—The onus of shewing that both parties had acted on the terms of an agreement which had not been, in form, executed by either, lies upon the party who rests his case on that circumstance. Brogden v. Metropolitan Railway Company - - - H. L. (E.) 666

SALE OF REVERSION—*Undervalue—Infant—Professional Assistance.*] Mere inadequacy of price will entitle an expectant heir to apply to the Court of Equity to set aside (on terms) the sale of a reversion, and the onus of proving the transaction fair, and the price sufficient, is on the purchaser.—The repeal of the Usury Laws has not affected the jurisdiction of the Court of Chancery to give adequate protection, in such cases, to expectant heirs or persons under pressure.—A settlement of an estate made on the marriage of *J. B.* and *M. L.* charged a sum of £300 a year as an annuity in favour of the intended wife for her life, and a sum of £3000 for portions for younger children. There were six younger children. *J. B.* got into money difficulties, and disposed of his own interests in the estate. The eldest son of *J. B.* became possessed (his father being still alive) of the estate itself, and sold it to *O'R.*, subject to the charges upon it for the wife's annuity, and the children's portions. Some of the children sold their expected portions to *O'R.* and to another person for varying sums of money. *J. B.*, the father, proposed to *O'R.* to purchase the portion of *John*, the youngest but one of the family. The father was then sixty-one years of age, and a stockbroker (who knew nothing of the state of *J. B.'s* health) valued the portion (£500) at £326. *O'R.* refused to give more. The negotiations for the sale lasted some weeks, the son all that time residing with the father at *Dover.* The son came of age on the 11th of April, 1870, went over to *Ireland* on the 18th of April, saw *O'R.* and his solicitor on the 20th of April, saw the deed on the 28th of April, was stated to have examined it, and expressed his approval of it (but that was denied), and executed it on the 30th of April, 1870. He never had a separate solicitor, or any one to act for him in the character of an independent adviser. The purchase-money was to be paid by yearly instalments. These were regularly paid till the end of 1874, and accepted by the son. At that time the son filed his bill to set aside the sale as fraudulent and void, and to have an account. The Master of the Rolls in *Ireland* had dismissed the bill, the Court of Appeal reversed that decision:—*Held*, by Lords *Blackburn* and *Gordon*, that, there being no evidence of fraud, the bill could not, under the circumstances, be sustained, and the decision of the Court of Appeal in *Ireland* was reversed.—*Diss.*, Lord *Hatherley*, who was of opinion that though there was no evidence of fraud or misconduct on the part of the purchaser, still that the circumstances of the case brought it within the rule of Equity, that protection ought to be afforded to expectant heirs in cases of this kind, and that, as the young man here had not had the protection of a separate and independent adviser, the whole transaction must be opened. O'Rorke v. Bolingbroke H. L. (I.) 814

SALMON FISHERY—Right acquired by trustee of land - - - - 544
See Scotch Law. 6.

SCOTCH LAW—*Bankruptcy—Retention and Compensation—Mutual Credit—Set-off—Collateral Security no Bar—Holder of Bill after Bankruptcy.*]

SCOTCH LAW—*continued.*

Per Lord *Blackburn:* The law of *Scotland* on the subject of compensation and retention in bankruptcy is, in effect, very nearly, if not precisely, the same as the law of *England* with respect to mutual credit.—*Per* Lord *Blackburn:* I think the law is tersely and accurately expressed by Lord *Ormidale* in the Court below. He says: "I can neither find authority, nor see any good reason for holding, that the circumstance of a party having a collateral security for his debt is destructive of his right of compensation or set-off,—supposing it to be otherwise well founded."—*Per* Lord *Blackburn:* It has for many years been decided, both in *England* and in *Scotland*, that if the indorser of a bill became a party to the bill before the bankruptcy, he may set it off on becoming holder afterwards. McKinnon *v.* Armstrong [**H. L. (Sc.) 531**

2. —— *Compulsory Enlargement of a Churchyard by Order of Presbytery.*] *Held*, that an order of Presbytery for the enlargement of a churchyard having been preceded by sufficient anterior notice to the landowner and others affected, was not to be impeached on the ground of mere informality.—*Per* Lord *Cairns*, L.C.: A Presbytery does not proceed on fixed and settled *formulæ* with regard to notices; but in this case it appears to me that, both in form and in substance, the Presbytery gave a notice such as fairness required of their intention to exercise jurisdiction. Walker *v.* Presbytery of Arbroath - - - **H. L. (Sc.) 79**

3. —— *Court of Judiciary—Its Jurisdiction unappealable.*] An appeal to the House of Lords does not lie from any sentence or order of the High Court of Justiciary in *Scotland.*—*Per* Lord *Cairns*, L.C: The sentences and orders of the Court of Justiciary are by statute made final and conclusive.—*Per* Lord *Hatherley:* I am clearly of opinion that this House is not a Court of appeal from the Justiciary Court in *Edinburgh.*—*Per* Lord *O'Hagan:* No such appeal has ever been admitted by the House, although several cases have been the subject of discussion at this Bar. Mackintosh *v.* Advocate for Scotland **H. L. (Sc.) 41**

4. —— *Marriage — Suit for Declarator dismissed—Suit renewed—Res judicata.*] In 1842 a suit for declarator of marriage was brought against a lady, but after trial was dismissed in 1846. In 1875, after the lady's death, a second suit was brought for declarator of the same marriage, and for reduction of the former decree. In 1876 the second suit was held to have been barred by the plea of *res judicata*, and this decision, on appeal, was affirmed by the House of Lords.—*Per* Lord *Cairns*, L.C.: The Appellant has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of the former proceedings.—*Per* Lord *Hatherley:* I do not apprehend that we need go further than to say that this gentleman—who had the opportunity of having his case fairly heard thirty years ago—cannot now, after the death of the person principally concerned, be in a position to ask that the principle of *res judicata* shall not be pressed to its fullest and furthest results.—*Per* Lord *Selborne:* When there is *res judicata* the original cause of action is gone; and it would be destructive of all certainty in the administration of law, in the status of families, and in the enjoyment of rights, if it were not held incumbent on any one attempting to get rid of a solemn judgment to shew that he comes forward to do so with reasonable promptitude and diligence.—*Per* Lord *Blackburn:* The object of the rule of *res judicata* is always put upon two grounds; the one, public policy, that there should be an end to litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before, and *à multo fortiori* there is nothing alleged that would be ground for a new trial after judgment pronounced thirty years ago.—*Per* Lord *Gordon:* It would be lamentable for the law of *Scotland*, especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the cause was originally tried. Lockyer *v.* Ferryman - **H. L. (Sc.) 519**

5. —— *Nuisance—Joint Complaint and Joint Defence allowed—But in such a Case there must be Contingentia—Habit of the House as to Scotch Practice.*] In matters of practice where the Judges of the Court below have been unanimous, the House never varies their decision unless perfectly satisfied that it is founded on erroneous principles.—*Held* by the House, affirming the decision of the Court below, that in a case of nuisance the several sufferers may combine and bring a joint action against the several authors of the nuisance;—asking a declarator and interdict but not claiming damages.—*Per* Lord *Cairns*, L.C.: There may be an inconvenience, amounting almost to an impossibility, in joining a number of Pursuers in an action for damages against a number of Defenders. But where the action is one, not of damages, but of declarator and interdict, the convenience and even justice of the case is best met by a joint proceeding.—*Per* Lord *Penzance:* When the action is not one of damages but of declarator and interdict, the convenience and even justice of the case is best met by a joint proceeding. In this respect the Scotch practice differs widely from the English.—*Per* Lord *O'Hagan:* The convenience of having at once before the Court all persons affected by a process of this kind seems very manifest.—*Per* Lord *Blackburn:* As to joining parties, the law of *Scotland* differs from the law of *England*; and if I were called upon to deliver an opinion I should be inclined to say that the Scotch law was better; but if two Pursuers or two Defenders are to be united in one action, they must have a *contingentia* connecting them with each other. Cowan *v.* Duke of Buccleuch - - - **H. L. (Sc.) 344**

6. —— *Trustee—Fiduciary Position—Lapse of Time—Salmon-fishings—Remit as to Retrospective Accounting*] *Per* Lord *Cairns*, L.C.: Where trustees acquire a benefit as ostensible owners of trust property, that benefit cannot be retained by them, but must be surrendered to

SCOTCH LAW—*continued.*
those who are beneficially interested.—*Per* Lord *O'Hagan:* The law of *Scotland*, equally with the law of *England*, condemns the misuse of a fiduciary position, and declares that any advantage wrongfully gained by a trustee shall enure to the benefit of the *cestui que trust.*—*Per* Lord *O'Hagan:* Where a trust has been broken by the trustees for their own benefit, and to the injury of the *cestui qui trust*, no lapse of time can validate the transaction.—Where the trustees of land affecting actual ownership acquire from the Crown a right of salmon fishing in the adjacent sea, the acquisition enures to the benefit of the *cestui que trust.*—Cause remitted back to the Court of Session to consider the question of retrospective accounting, as to which the House expressed no opinion. ABERDEEN TOWN COUNCIL *v.* ABERDEEN UNIVERSITY - **H. L. (Sc.) 544**

SEAWORTHINESS—Warranty of - - **284**
See INSURANCE. 2.

SERVICE—Out of jurisdiction—Law of *Jamaica*
See JAMAICA, LAW OF. [**381**

SET-OFF—Scotch law—Bankruptcy - **531**
See SCOTCH LAW. 1.

SHIFTING CLAUSE—Eldest son - - **698**
See WILL. 1.

—— Peerage—Invalidity - - - **1**
See PEERAGE.

SHIP—*Cargo—Hypothecation—Duty of the Master—Bottomry Bond—Communication with the Owners.*] A master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *à fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. KLEINWORT *v.* CASSA MARITTIMA OF GENOA **P. C. 156**

2. —— *Cargo—Time of Loading—Condition Precedent—Usage of Trade—"Shipped"—Costs.*] The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the Court.—Two contracts, each for the sale of 300 tons of rice, were made in *London*. The first contract (which the second exactly followed) was for 300 tons "of *Madras* rice, to be shipped at *Madras*, or coast, for this port, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, *per Rajah of Cochin.*" The 600 tons filled 8200 bags. The vessel arrived at *Madras* in February, and on the 23rd of that month 1780 bags were put on board, and on the 24th of February a like number; on the 28th of February 3560 bags were put on board, and bills of lading were given for those amounts on the days mentioned. A bill of lading for the remaining 1080 bags was given on the 3rd of March, but all, except fifty bags, had been put on board before that day. In an action for refusing to accept the rice, the defence was that it had not been shipped during the months of March $\frac{\text{and}}{\text{or}}$ April:—*Held*, that the contract had not been complied with; that its words must be construed in their plain and ordinary sense; that evidence of any usage in the particular trade must, to affect their meaning, be very clear and consistent, and such evidence not having been given in this case, the Plaintiffs could not recover on the contract.—*Per* Lord *Blackburn:* If an article sold is described, the description amounts to a warranty or a condition precedent that it shall be an article of the kind described.—The judgment of the Court of Appeal was reversed, and that of the Court of Queen's Bench restored, with costs.—Observations on "shipped" and "shipment."—*Alexander* v. *Vanderzee* (Law Rep. 7 C. P. 530) considered. BOWES *v.* SHAND [**H. L. (E.) 455**

3. —— *Collision—Ship in Stays—Rule of Navigation.*] When a port-tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard-tacked vessel.—A starboard-tacked vessel, when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision.—Both vessels were held to blame for the collision. WILSON *v.* CANADA SHIPPING COMPANY - - - **P. C. 389**

4. —— *Freight—Mortgage of Ship—Bill of Lading.*] A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains the *dominus* of the ship, with regard to everything relating to its employment, or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable.—Goods which, by the terms of the bill of lading, have been carried upon a nominal amount of freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount.—The owner of the ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it.—*M.* was the owner of sixty shares in a ship. *B.* (who acted as master) was the owner of the remaining four shares. As *B.* could not get, at *San Francisco* where he was, any employment for the ship, he determined to obtain a cargo of wheat and bring it to *England* "on ship's account." Not having money to purchase the wheat, he obtained the cargo on the credit of *P. & Co.*—To them he gave bills of lading, describing the wheat as "shipped on owner's account," deliverable to the order of *P. & Co.* "at freight of 1*s.* per ton." Bills of exchange for the price of the wheat (afterwards duly accepted by *M.*) were also given to *P. & Co.* *M.*, who carried on business in *London*, had obtained from *K. & Co.*, merchants in *London*, advances of money, and, by way of security, had given them a mortgage of his shares in the ship. While the ship was on its voyage, *M.* arranged with *B. & Co.*, also of

SHIP—*continued.*
London, to make him advances to take up the bills of exchange; the advances were made, and, for these advances he agreed that *B. & Co.* should receive the bills of lading, and certain policies of insurance effected by him and should sell the cargo for his account and their own. *B. & Co.* sold the cargo of wheat to third persons. The sale-note described the wheat as "at the price of 43*s.* 6*d.* per quarter of 500 lbs. shipped . . . including freight and insurance, &c. . . . Vessel to discharge afloat. Payment, cash in *London*, within seven days," &c. The last sentence of the note was, "As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton of 2240 lbs. and invoice to be rendered accordingly." The invoice, made out by *M.* contained these words "6179 qrs. @ 43*s.* 6*d.* per 500 lbs." "Freight on tons 1379–7–1–3 @ 55*s.* per 2240 lbs." *M.* obtained from *B. & Co.* necessary advances, with which he took up the bills of exchange, which, with the bills of lading attached, were then handed to him. Both sets of bills were delivered to *B. & Co.* with a memorandum indorsed on the bills of lading that they were "assigned to *B. & Co.*" and "the freight assigned is at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton." The bills of lading and invoice were sent to the purchasers of the wheat. When the vessel arrived *K. & Co.*, as mortgagees of the ship, took possession of it. The purchasers of the wheat claimed delivery of it to them on payment of the freight stated in the bills of lading:—*Held*, that they were entitled to the delivery of it on payment of that freight, for that the bill of lading could not, under the circumstances of the case, be altered, and that the 55*s.* per ton, introduced into the bought-note, formed part of the whole purchase-money, being a payment to be made on delivery of the cargo, and though called "freight" did not properly bear that character. Keith *v.* Burrows - - - - **H. L. (E.)** 636

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SURFACE—Subsidence—Support - - 95
See Support.

SUPPORT—*Mineral Workings—Subsidence of Surface—Injuries by consequent Waterflow—Obligation to restore the Surface.*] The right to work mines is a right of property; which, when duly exercised, begets no responsibility:—*Per* Lord *Blackburn:* The owner of minerals has a right to take away the whole of them in his land, according to the natural course of user.—Where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coal-field, the injuries, being entirely from gravitation and percolation, are not a valid ground for any claim of damages.—*Per* Lord *Blackburn:* Where there is an agreement between the owner and his tenant that, when the mines are worked out, the surface shall be restored, the owner may complain if it be not restored; but that gives no claim to any one else. Wilson *v.* Waddell - - - **H. L. (Sc.)** 95

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VICTORIA, LAW OF—*Company—Powers of Directors to borrow and mortgage—Ratification by Company of particular act of Directors done in Excess of Authority—Such Ratification not an Extension of future Authority.*] By Art. 50 of the articles of association of the *O. R. Company* (which was limited by guarantee, and registered in *Victoria* under a local Act corresponding with the English *Companies Act*, 1862), it was provided that the directors' power of borrowing sums on the credit of the company "should not exceed in the aggregate as an existing debt at the same time one-half of the then actually paid-up capital." The articles contained no restriction upon the company's power of borrowing; and the directors' power to borrow was capable of being extended under Art. 31, by one-half of the votes of all the shareholders given at a general meeting.—On the 23rd of December, 1867, the directors obtained a letter of credit, No. 150, for £10,000, and on the 11th of September, 1868, a letter, No. 141, for £5000, and stated to that effect in their report of the 29th of October, 1868, which was ratified at the half-yearly meeting of that date. Letter No. 150 expired on the 29th of March, 1869, but was renewed. On the 9th of September, 1869, the directors obtained another letter of credit, No. 153, for £5000, but this act was never assented to or ratified by the shareholders.—In a suit by the Respondent bank to enforce against the Appellant, as the assignee of the right, title, and interest of the *O. R. Company*, an equitable mortgage which had been granted by the company to secure advances made by the bank, which, with interest, amounted to £15,296, it appeared that half of the actually paid-up capital was never more than £8550; that at the end of 1870 the balance due to the bank was £8; and that the sums claimed in this suit had been advanced in February, 1871, viz., £10,000 under letter No. 150, and £5000 under letter No. 153:—*Held*, that the limitation of the power of borrowing and mortgaging contained in Art. 50 was merely a limitation of the authority of the directors conferred by the same article; that it was not a limitation of the general powers of the company, and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding.—The ratification of the report of the 29th of October, 1868, did not authorize the directors to obtain letter of credit No. 153, in September, 1869, or to borrow £5000 thereon in February, 1871.—The ratification of letter of credit, No. 150, for £10,000, did not authorize the renewal of it, or the acting upon it after the time originally limited had expired.—Although it might be competent for a majority of shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; yet if the object was to give the directors in future an extended authority beyond what is given by Art. 50, that could only be effected by a vote of one-half of all the shareholders of the company. The ratification at a half-yearly meeting of a particular act of the directors in excess of authority would not extend the authority of the directors so as to authorize them to do similar acts in future.—*Royal British Bank* v. *Turquand* (5 El. & Bl. 248; 6 El. & Bl. 327) distinguished. Irvine *v.* Union Bank of Australia - **P. C. 366**

2. —— *Rateability—Victoria Local Government Act*, 1874, *s.* 253—*Racecourse—Victoria Racing Club Act*, 1871.] In *Victoria* the exemption of Crown property from rateability is defined and limited by express enactment; and under the *Local Government Act*, 1874, s. 253, includes "land, the property of Her Majesty which is unoccupied or used for public purposes, land in the occupation of the Crown or the Government of *Victoria*."—A racecourse held by the Respondent under a demise from the Crown in trust for a racing club, and for the purposes of the *Victoria Racing Club Act*, 1871, whether or not it continued to be the property of the Crown within the meaning of the above section, is not land used exclusively for public purposes, and therefore is not exempted. There was on the part of the club, according to the true construction of their Act, a beneficial enjoyment of the land beyond that of the general public, and a pecuniary interest in the surplus rents and profits of the racecourse, after providing for its maintenance and use. Mayor and Corporation of Essenden *v.* Blackwood - - - - - **P. C. 574**

3. —— *Succession Duty—Victoria Act, No.* 388.] A testator having died whilst Act No. 388 was in force, and probate to his will having been applied for and granted before Act No. 523 was passed, but after the time fixed for its coming into operation retrospectively:—*Held*, that the duty payable on the testator's estate under the former Act having been directed by sect 10 thereof to be deemed a debt of the testator to Her Majesty, accrued due *eo instanti* on his death, at the rate prescribed by that Act, although the amount of such duty might have to be subsequently ascertained.—Probate duty in *England* is a stamp duty payable upon the value of the property the subject of the probate at the time it is granted. The duty payable under Act No. 388 is more in the nature of a succession duty, payable, whether probate is sought or not, on the value of the estate at the time of the testator's death. Bell *v.* Master in Equity of the Supreme Court of Victoria - - - - - **P. C. 560**

4. —— *Transfer of Lands Statute—Registration of Purchase from Judgment Debtor—Alias Writ of Fi. Fa.*] On the 2nd of January, 1872, *B.*'s transferor presented for registration under the *Transfer of Lands Statute* transfers of certain lands; and on the 21st of the same month *B.* obtained registration of the transfers and the

VICTORIA, LAW OF—*continued.*
usual certificates of title. More than three months previously, viz., on the 20th of October, 1871, a copy of a writ of *fieri facias* (which had been issued by the Supreme Court in an action against the said transferor) was served on the Appellant under sect. 106 of the said statute, specifying the said lands as "the lands sought to be affected thereby," and was by the Appellant duly entered. On the 5th of January, 1872, a copy of an *alias fieri facias* in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the Appellant.—On the 2nd and 28th of March, 1872, transfers of the same lands from the district sheriff to the Respondent under the *alias* writ were lodged for registration with the Appellant, who refused to register them or to issue certificates of title:—*Held*, on petition by the Respondent under sect. 135 of the said statute, that the Appellant was right in such refusal. *B.* had previously to the 5th of January, 1872, acquired a title to the lands which could only be defeated by a sheriff's transfer of them in pursuance of the original writ; and as the Respondent's transfers were in pursuance of the *alias* writ, and were made at a time when according to the statute no valid transfer could have been made in execution of the original writ, the Appellant was right in completing *B.'s* title by registration on the 21st of January. Registrar of Titles *v.* Paterson [**P. C. 110**

5. —— *Waste Lands—Grant by Crown—5 & 6 Vict. c. 36—Rights of the Crown in Gold and Silver found under the Soil.*] A grant of waste lands in *Victoria*, under the Imperial Statute, 5 & 6 Vict. c. 36, and made before the passing of the Imperial Statute, 18 & 19 Vict. c. 55, does not transfer to the grantee the gold and silver that may be found under the lands so granted. Woolley *v.* Attorney-General of Victoria [**P. C. 163**

WASTE LANDS—Grant of—*Victoria*—Gold and silver - - - - - **163**
See Victoria, Law of. 5.

WATER—Damage to mine - - - **781**
See Mine.

—— Injury to surface—Right of support - **95**
See Support.

WILL—*Construction—"Become the Eldest Son."*] Where the words of a will are unambiguous, they cannot be departed from merely because they lead to consequences capricious or even harsh and unreasonable. But where they are capable of two interpretations, that construction of them is to be adopted which is in accordance with an intelligible and reasonable, and not a capricious or anomalous, result.—The rule stated in *Abbott* v. *Middleton* (7 H. L. C. at p. 89) adopted.—A testator, *E.*, devised his estates to *R.* the second, *J.* the third, and *C.* the fourth sons of his brother-in-law Sir *T. S.* (entirely passing over *W.*, the eldest son), and to their sons successively in tail male. By a name and arms clause he directed that as any one became entitled under the will he should assume the name and arms of *E.* He then introduced a shifting clause, that in case *R.*, or *J.*, or *C.* "should become the eldest son" of Sir *T. S.*, the *E.* estates should go over to the next in remainder under his will. The testator died in 1819. Sir *T. S.* survived the testator. *W.*, the eldest son, succeeded his father in the *S.* baronetcy, and in the paternal estates; and disentailed and sold them. On his death without issue *R.* succeeded to the baronetcy. He had long before complied with the name and arms clause in the testator's will, and was in possession of the *E.* estates. *R.* died without male issue, and *J.*, the third son, then claimed the *E.* estates:—*Held*, that he was entitled to them, for that upon the true construction of the will he had not "become the eldest son," of Sir *T. S.*, and the shifting clause had therefore not taken effect.—*Per* Lord *Cairns*, L.C.: The eldest son of a man is his first-born — the *primogenitus;* and the words "shall become the eldest son" of a person living at the date of a will cannot, without an explanatory context, be extended beyond the lifetime of that person; they are connected with the heirship of, and right of succession to, a living man.—*Per* Lord *Selborne:* In order to give a different construction to the will, the word "surviving" would require to be introduced between the word "eldest" and the word "son." Bathurst *v.* Errington - - - **H. L. (E.) 698**

2. —— *Trustees' Discretion — Two Funds — Form of Decree.*] Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the Court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion, and "uncontrollable authority" over its application the Court will not exercise its ordinary power. The fund so specially provided will be left to the exercise (*bonâ fide*) of the discretion of the trustees.—A testator (whose wife had, in her own right, property which was not referred to in his will) devised his real and personal estates to trustees upon various trusts, one of which was that "my said trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income of my real and personal estate and investments, &c., as they shall think expedient to or for the clothing, board, &c., for the personal and peculiar benefit and comfort of my dear wife." One of the trustees was the testator's brother, and he was made the residuary legatee:—*Held*, that the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will.—The absolute discretion and "uncontrollable authority" of the trustees being thus recognised, a declaration in the decree that "their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources will make up," &c., was ordered to be struck out.—But this varying of the decree of the Court below was not to affect the costs of the

WILL—*continued.*

appeal.—Directions given as to how this part of the decree was to be framed. Gisborne *v.* Gisborne. [H. L. (E.) 300

—— Legacy—Express trust—Statute of Limitations - - - - - 215
See Limitations, Statute of.

WORDS—" Eldest son " - - - 698
See Will. 1.

—— " Never been heard of " - - 487
See Insurance. 1.

WORDS—*continued.*

—— " Parallel " - - - - 423
See Patent. 2.

—— " Servants " - - - - 792
See Railway and Canal Traffic Act.

—— " Shipped "—" Shipment " - - 455
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YOUNGER SON—Becoming eldest - - 698
See Will. 1.

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